CONGRESSIONAL DIGEST

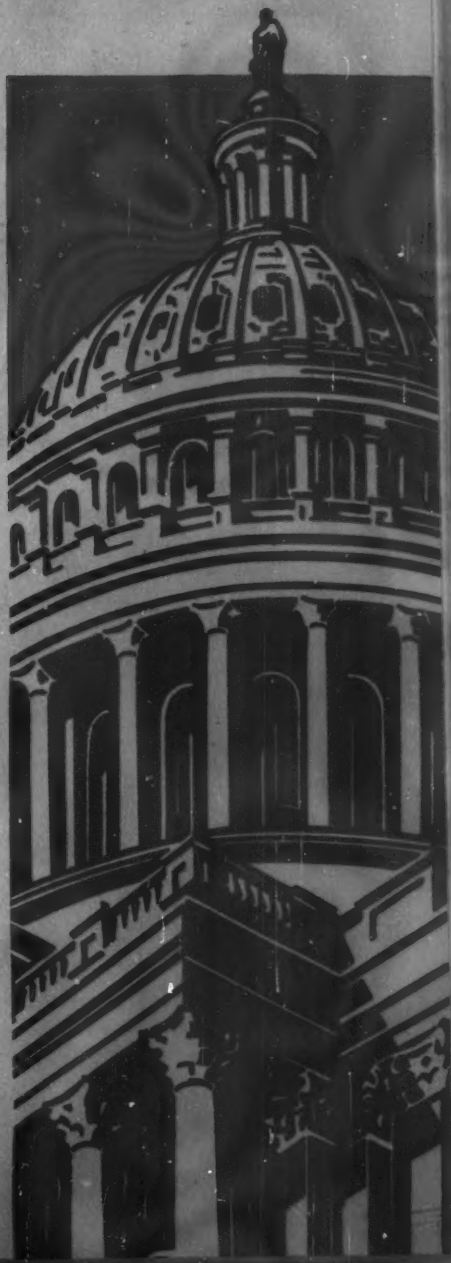
PRO AND CON

December, 1933

The U. S. Supreme Court and the "N.I.R.A."

How the Supreme Court was Created
Its Development in American History
Power to Pass on Acts of Congress
Character of its Present Membership
The National Industrial Recovery Act

Are the Provisions of the National Industrial Recovery Act Constitutional?



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THE
CONGRESSIONAL DIGEST

The Question This Month:

Are the Provisions of the National Industrial Recovery Act Constitutional?

Foreword

THAT the Constitutionality of the provisions of the National Industrial Recovery Act will ultimately be tested in the Supreme Court of the United States has now passed the point of mere speculation or prophecy. A dozen or more suits involving the provisions of the Act, as actually applied, are already before the lower courts making it certain that one or more of these suits will eventually reach the Nation's highest judicial tribunal. In fact, suits touching the edge of the controversy are already before the Supreme Court, but none actually involving the specific provisions of the Act have so far reached it.

An effort to present samples of the cases pending in the lower courts would be futile, since no two are exactly alike and, among them, all phases of the controversy over states rights, individual rights, interference with the freedom of interstate commerce and other rights, real or assumed, are covered.

There is, however, intense interest among Government officials, members of Congress and lawyers as to the probable action of the Supreme Court on a straight-out test case over the Constitutional validity of the provisions of "N.I.R.A."

Among those responsible for the Act and those who have to do with its administration, interest in the attitude of the Supreme Court is particularly keen. For, while the operation of the Act is distinctly limited to two years, its original sponsors are definitely wedded to a plan to make it permanent. In fact, legislation to this end may be introduced during the coming session of Congress. If this move is made it will be because the firm advocates of national economic planning and governmental control of industry feel that the present temper of Congress is such that it will vote for the necessary legislation. If the move is delayed it will be because its supporters feel that better success will be insured if the operations of the National Recovery Administration are proven, a year or so from now, to have been generally successful. A decision as to when to make the move will probably not be reached until after Congress reconvenes on January 3 and an opportunity has been furnished to sound out sentiment among Senators and Representatives.

While the majority of the Democrats in Congress might be counted on to support this move, with a majority of the Republicans opposing it, party lines will not be intact. Among the conservative Democrats there is already evidenced a decided break away from what they consider to be the radical, almost socialistic tendencies of the Roosevelt administration. Whereas many of this element "went along with" the President in the last session because they did not want to start a family row immediately and because they knew it would be useless if they did, they are now ready to kick over the traces.

To match them, however, the progressive western Republicans may furnish some support for permanent industrial control legislation. How many of them would fall into line is purely problematical. Until Congress is assembled any effort to guess its temper is useless.

But, regardless of what Congress may or may not do, the power of the Supreme Court in connection with the underlying principles of the Recovery Act is a vital factor in its future. Because of this it is desirable that the student of national affairs should have some knowledge of the Supreme Court as an integral part of the American Government.

The reasons for the creation of the Supreme Court of the United States as the court of last resort in the Federal judiciary system and its authority to pass on the validity of the Acts of Congress are set forth in the following pages in extracts from the writings of Mr. Chief Justice Hughes. These extracts are from what was originally a set of lectures Mr. Hughes delivered at Columbia University during the period between his resignation as an Associate Justice and his appointment as Chief Justice.

Interesting light on the thought of the nine men who make up the Supreme Court today is to be found in the article by Mark Sullivan, internationally known historian and newspaper writer.

The Pro and Con section contains discussions of all phases of the question of the probable interpretation by the Supreme Court of the National Industrial Recovery Act, also there are to be found citations from the Constitutional provisions creating the Supreme Court and from the Act of the First Congress, establishing it, together with an authoritative summary of the National Industrial Recovery Act.

How the Supreme Court of the United States was Created

I—Tri-partite Government
II—Provisions of the Constitution
III—The Judiciary Act of 1789

I—Tri-partite Government

by Dr. W. W. Willoughby

IN forming a scheme for central government, our fathers were restrained, not only by the fear lest a national government should be established so strong as to threaten the autonomy of the States, but were fearful lest, like Frankenstein, they should create a being which, when life were once breathed into it, would be beyond their control, and which, though originally with proper powers, would in time, by its own strength, draw to itself increasing powers and become a tyrant. To avert this evil, the members of the convention made the three branches of government co-ordinate in power.

The most powerful of these checks in retaining, not only the proper relations between the state and federal power, but between the departments of the federal government, has undoubtedly been the Supreme Court. It has been the balance wheel of the republic. The Constitution as supreme over all these powers, has set to them a limit—the Supreme Court, as interpreter of the Constitution, has been the instrument for rendering operative these limitations.

To render the Supreme Court capable of performing this high function expected of it, it was necessary to endow it with two attributes; first, independence of the legislature; and second, power to hold, in suits between parties, legislative acts unconstitutional, and therefore void. The granting of this power was not left to the mere caprice of its creators, but was forced upon them by the very nature of our government. The establishment of a sovereign legislature is inconsistent with the very aim of federalism, namely, the maintenance of a division of powers between the national and state governments. To have made Congress the authorized interpreter of its own acts, would evidently have left unobstructed the road to rapid absorption of state duties in national governmental activity.—*Extracts, see 1 p. 320.*

II—Provisions of the Constitution for the Federal Judiciary

Art. III, Sec. 1, Par. 1.—The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation which shall not be diminished during their Continuance in Office.

Art. III, Sec. 2, Par. 1.—The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—between a State and Citizens of another State;—to Controversies between two or more States;—between Citizens of different States;—between Citizens of the same State claiming lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Art. III, Sec. 2, Par. 2.—In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Art. III, Sec. 2, Par. 3.—The Trial of all Crimes, except in Cases of Impeachment shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Art. III, Sec. 3, Par. 1—Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of Two Witnesses to the same overt Act, or on Confession in open Court.

Art. III, Sec. 3, Par. 2.—The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person Attained.

Art. VI, Par. 2.—This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment XI.—The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the

United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Art. II, Sec. 4.—The President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery or other high crimes and misdemeanors. (This Article covers the liability of members of the Supreme Court to impeachment.)

III—The Judiciary Act of September 24, 1789

(First Congress, 1st Session)

THE Judiciary Act provided that the Supreme Court of the United States should consist of a Chief Justice and five Associate Justices, any four of whom should be a quorum, and should hold annually at the seat of government two sessions, commencing on the first Monday of February and the first Monday of August. The Associate Justices were to rank according to the date of their commissions, or when the commissions bore date on the same day according to their respective ages.

The Court was empowered to appoint a clerk, and his oath of office was prescribed. The oath of the Justices of the Supreme Court was directed to be that they would "administer justice without respect to persons, and do equal right to the poor and to the rich," and that they would faithfully and impartially perform all the duties incumbent upon them, according to the best of their abilities and understanding, agreeably to the Constitution and Laws of the United States.

It was provided that the Supreme Court should have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens; and except also between a State and citizens of other States, or aliens, in which latter case it shall have original, but not exclusive jurisdiction; and shall have exclusively all such jurisdiction of suits or proceedings against ambassadors or other public ministers or their domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction, of all suits brought by ambassadors or other public ministers, or in which a Consul or Vice-Consul shall be a party.

It was expressly provided that the trial of issues in fact in the Supreme Court, in all actions at law against citizens of the United States, should be by jury.

The appellate jurisdiction of the Supreme Court from the Circuit Courts and Courts of the several States was specially provided for in the famous 25th Section, and power was given to issue writs of prohibition to the District Courts when proceeding as Courts of Admiralty and maritime jurisdiction, and writs of mandamus in cases warranted by the principles and usages of law to any Courts appointed or persons holding office under the authority of the United States.

The Supreme Court was not to issue execution in cases removed before them by writs of error, but was directed to send a special mandate to the Circuit Court to award execution thereupon.

The remaining provisions of the Bill related to the division of the United States into thirteen districts, and three circuits; the establishment of a District Court in each District, and provisions for the holding of special District Courts. The Circuit Courts were to consist of any two Justices of the Supreme Court and the District Judge of such District, any two of whom were to constitute a quorum, provided that no District Judge should give a vote in any case of appeal from his own decision, but might assign the reasons in support of it. The jurisdiction of the District and Circuit Courts were then regulated and distributed, and special provisions made as to matters of practice; the entry of special bail; the production of books and writings; the granting of new trials; the awarding of executions; the finality of decrees; the regulation of appeals and writs of error; the appointment of Marshals; the default of his deputies; the regulation of trials in cases punishable by death; the drawing of juries; the mode of proof; the taking of depositions "de bene esse." Finally it was provided that parties in all Courts of the United States might personally plead and manage their own causes, or by the assistance of such counsel or attorneys at law as by the rules of the said Court should be permitted to practice therein. An attorney for the United States was to be appointed in each District, and an Attorney-General for the United States whose duty it should be to prosecute and conduct all suits in the Supreme Court in which the United States should be concerned, and to give his advice and opinion upon questions of law when required by the President, or when requested by the heads of any of the Departments touching any matters that may concern their Departments.

Such were the leading features of the first Judiciary Act of the United States, and it only remained for the President to appoint, and the Senate to confirm, judges to fill the positions which had been created in order to organize the judicial department of the Government.—*Extracts, see 2 p. 320.*

Members of the First Supreme Court, Appointed by President Washington in 1789

Chief Justice

John Jay, of New York

Associate Justices

John Rutledge, of South Carolina
James Wilson, of Pennsylvania
William Cushing, of Massachusetts
*Robert Harrison, of Maryland
James Iredell, of North Carolina
John Blair, of Virginia

*Five days after his confirmation and before he had an opportunity to serve, Robert Harrison was chosen Chancellor of Maryland and resigned his position on the Supreme Court to accept the Maryland office. James Iredell was appointed in his place.

The Supreme Court "Distinctly American"

I—Historical Background of Nation's Highest Tribunal

II—Its Right to Decide the Validity of Acts of Congress

by Chief Justice Charles Evans Hughes

(From The Supreme Court of the United States—An Interpretation)

THE Supreme Court of the United States is distinctly American in conception and function, and owes little to prior judicial institutions aside from the Anglo-Saxon tradition of law and judicial processes. In considering the historical background of the Court, it does not aid much to review experiences in other lands.

A Federal judiciary was an essential part of the conception of a national government of a Federal type. Such a government must have its legislature and a court to interpret legislation. State courts would be bound by Federal laws and would have to apply them, but final interpretation of such laws could not be left to a State tribunal, much less to the tribunals of a number of States whose judgments might not agree. The proposed Federal government was of necessity, in view of the existence of the States and of the sentiment which supported them as autonomous within their spheres, to be one of limited powers. To establish such a government was the purpose of a written constitution. The framers of the Constitution intended that the Federal government to be set up should act directly upon the individual citizen and not simply upon the States. This was the essence of its national character. If there was to be a written constitution defining, and thus limiting, Federal powers, and these definitions were to have the force of constitutional or supreme law, it would be essential that the tribunal which interpreted and applied Federal law should recognize and apply the limits of both Federal and State authority. And as that government acted upon the individual citizen, he was deemed to be entitled to invoke its limitations. Thus, in the most natural way, as the result of the creation of Federal law under a written constitution conferring limited powers, the Supreme Court of the United States came into being with its unique function. That court maintains the balance between State and Nation through the maintenance of the rights and duties of individuals.

The men who sat in the Federal Convention of 1787 had political ideals but these did not run away with their practical judgment. The appreciation of definite exigencies had slowly developed a national consciousness. The character of the tribunal set up was due not to experience abroad or to the wisdom of other peoples, but to convictions which had become deep-seated as a result of the experiences of the Colonies and of the States that succeeded them. The common law of England, variously interpreted in the courts of the Colonies, was the basis of their jurisprudence. It was fitted to their needs both by their legislatures and by judicial decisions. Appeals generally lay from the courts to the legislative assemblies and finally to the King in Council, this resort to the Crown, thoroughly established long before the Revolution, being deemed, as Story remarks, a protection rather than a grievance. The colonial judges for the most part were appointed by the Crown or its representatives, the Governors. In Connecticut and Rhode Island the appointment was made by the legislature. As a rule, the bench was not learned and the selection of judges was largely determined by politics or favor. Of the judges of the first superior court in Massachusetts, none were lawyers. The growth of the Colonies and the increase of judicial work favored the development of judicial tribunals. But nowhere in the Colonies was there a real supreme court. In New York, the decisions of the court so-called were subject to review by the Governor and Council.

With these defects in the local administration of justice, what was the situation as to controversies which transcended local interests? There had been a fierce contest with respect to the powers given to admiralty courts in the pre-revolutionary period. With the beginning of hostilities, questions of prize assumed large importance. In November, 1775, Washington asked the Continental Congress—"Should not a court be established by authority of Congress, to take cognizance of prizes made by the Continental vessels?" The Congress responded with recommendations to the State legislatures to establish jurisdiction in cases of capture with appeal to Congress or its appointees. The States established the jurisdiction with varying methods. Some granted liberally, others restricted, the appeal to Congress.

Meanwhile, in the Articles of Confederation submitted by the Congress in November, 1777, and finally ratified in 1781, it was provided (Ninth Article) that the United States in Congress assembled should have the sole and exclusive right and power "of establishing rules for deciding in all cases what captures on land or water shall be legal"; of appointing courts for the trial of piracies and felonies committed on the high seas; and of establishing courts for receiving and determining finally appeals in all cases of capture. The United States in Congress was to "be the last resort on appeal in all disputes * * * between * * * states concerning boundary, jurisdiction, or any other cause whatever"; also in "all controversies concerning the private right of soil claimed under different grants of two or more states." Before the completion of the ratification of the Articles, the Congress resolved (1780) to establish a Court of Appeals in cases of capture.

It has been pointed out that this practice in cases of capture before the Constitution, although in a limited field, familiarized "the public mind with the complete idea of a superior judicature, exercised by federal courts."

While certain controversies between States were settled by agreement during the time that the Articles of Confederation were in force, there was one case actually decided under the provision of the Articles. The Congress directed Connecticut and Pennsylvania to appoint joint consent commissioners or judges to determine the Wyoming controversy. This was done in 1782 and judgment was pronounced in favor of Pennsylvania. This was the only decision of a controversy between States under the Confederation.

The experience under the Confederation amply demonstrated the necessity of defining and firmly establishing the Federal judicial power.

"We are fast verging to anarchy and confusion," said Washington. "Requisitions are actually little better than a jest & a by-word throughout the land. If you tell the Legislatures they have violated the Treaty of Peace, & invaded the prerogatives of the confederacy they will laugh in your face * * *." Washington felt that "virtue * * * has, in a great degree, taken its departure from us: & the want of disposition to do justice is the source of the national embarrassments * * *." A strange atmosphere in which to set up the most important and successful of judicial institutions! But there was clear thinking as to national needs and it was precisely because of these conditions that the leaders emphasized the importance of an adequate Federal judiciary. Hamilton thought that "the want of a judiciary power" was the crowning defect of the Confederation. Madison wrote to Washington in April, 1787: "The national supremacy ought also to be extended as I conceive to the Judiciary departments * * *. It seems at least necessary that the oaths of the Judges should include a fidelity to the general as well as local constitution, and that an appeal should lie to some national tribunals in all cases to which foreigners or inhabitants of other States may be parties. The admiralty jurisdiction seems to fall entirely within the purview of the national Government."

As the larger number of the members of the Federal Convention, including those enjoying the highest prestige because of their learning, ability and public service, favored a strong national government in this sense, it was natural that there should have been but little question as to the necessity of having a national judiciary. Its creation was a part of the conception of the division of powers.

With this measure of agreement, the Convention proceeded to the consideration of the organization of the judicial department. How many courts should there be? How should the judges be appointed? What should be their tenure? What should be the extent of jurisdiction? The Convention was peculiarly fitted to deal with these questions. Of its fifty-five members, there were thirty-one lawyers, equipped not only with the technical learning of their professions but with a broad experience in practical affairs which gave them a seasoned judgment and the vision of statesmen. Four had studied in the Inner Temple, five in the Middle Temple, ten had been State Judges, seven had been selected as judges to determine controversies between the States. Thirty-nine members of the Convention had served in the Continental Congress. Eight had taken part in the formulation of State constitutions. They were well qualified for every part of their task, and especially for the creation of the judicial institutions essential to the national life.

The Convention quickly determined on "one supreme tribunal," instead of one or more supreme tribunals as originally proposed in the Randolph plan.

Serious questions were raised as to the method of appointing the judges. How was the ideal of the separation of powers to be reconciled with practical exigencies? Despite the emphatic terms in which the political maxim had been laid down by the States, Madison found not a single instance in which the several departments of power have been kept absolutely separate and distinct." Jefferson in his "Notes on Virginia" observed that the legislature had in many instances "decided rights which should have been left to judiciary controversy." After a careful review of State practice, Madison concluded that "the legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex."

In many States, the legislature appointed the judges directly, and, notwithstanding the devotion to the doctrine of Montesquieu, it is not surprising that in the Federal Convention the Virginia plan should have proposed that the national legislature should appoint the judges of the Supreme Court. Meanwhile it had been suggested, with reference to the practice in Massachusetts, that the judges be appointed by the Executive, with the advice and consent of the Senate, and this proposal was finally adopted.

On the question of tenure there was a surprising lack of disagreement. All the plans agreed on the point that that the judges should hold office during good behavior and that they should receive a fixed compensation which should be neither increased nor diminished while they were in office.

The unanimity of view that the tenure of the judges should be during good behavior was due to the grave importance attached to their independence. That judicial commissions should run during good behavior was a reform secured by the Long Parliament in England and such commissions had been granted in the colonies. The Declaration of Independence set forth the grievance that George III had changed this and had made judges dependent upon his will alone for the tenure of their offices and the amount and payment of their salaries. The constitutions of a number of the States had provided that judges should hold office during good behavior. This was true in Massachusetts, Virginia, the Carolinas, Maryland, Delaware and in New York, save that in New York the judges had to retire at the age of sixty. In some States there were short terms, seven years in Pennsylvania and New Jersey. In Georgia, Connecticut and Rhode Island the judges were chosen annually. The prevailing opinion in the Federal Convention thus had abundant support in practice. It was thought to be plain that justice under the new constitution, with its novel demands upon ability and impartiality in maintaining the balance of a unique system of government, would fare better by having the judges independent than by subjecting them to the political control incident to a shorter term. The framers of the Constitution were intent on protection against legislative encroachments, and put their trust in the learning, ability, and conscientiousness of the judges rather than in any device of political mastery.

There are special considerations in the case of the Supreme Court of the United States, and these have been recognized when proposals for a change in the method of selection have been made. The vastness of the country, the enormous population, the inescapable difficulties in the choice of President, the opportunities for political

intrigue that would exist in the nomination of judges by national party conventions, are cogent reasons for the continuance of the present method which has even more to be said for it now than it had in 1787.

As to tenure, aside from the question of retirement for age, so much is to be said for the experience gained on the bench, so great is the importance of freedom from political interference, that one may conclude that probably more would be lost than could be gained by a change. Reflection upon the character and service of the judges who have sat for many years in the Supreme Court gives weight to this view. And yet I would not over-emphasize the point, for experience of the States having elections for definite terms has shown how strong is the demand for the continuance in office of good judges of the highest courts. Thus, in New York, under the pressure of the bar and the sound opinion of the community, both political parties have frequently co-operated in the renomination of judges, so that the average length of the service of judges of the Court of Appeals in that State compares favorably with that of the justices of the Supreme Court of the United States. But in connection with the latter, we are spared recurring political demands and, what is most important, the justices of the Supreme Court, dealing so largely with constitutional questions of the gravest sort, may address themselves to their work with freedom from anxiety as to their future and unembarrassed by suspicion as to their motives.

The Federal judges were made subject to impeachment, as other civil officers of the United States, for "Treason, Bribery or other high Crimes and Misdemeanors." According to the weight of opinion, impeachable offenses include, not merely acts that are indictable, but serious misbehavior which may be considered as coming within the category of high crimes and misdemeanors. Only one Justice of the Supreme Court has been impeached—Samuel Chase, who was acquitted in 1805.

II—The Supreme Court and the Acts of Congress

THE Judiciary Act of 1789 assumed that State courts would pass on the validity of acts of Congress and provided for review by the Supreme Court where the State court had held against their validity. In such a case the Supreme Court by the very terms of the act of 1789 was entitled to affirm as well as to reverse the judgment of the State court, and it has consequently been urged that the Judiciary Act recognized the authority of the Supreme Court to declare an act of Congress invalid. Thus Professor Beard says that "it would seem absurd to assume that an act of Congress might be annulled by a state court with the approval of the Supreme Court, but not by the Supreme Court directly." Whether we regard this authority of the Supreme Court as recognized by the Judiciary Act or "as a natural outgrowth of ideas that were common property of the people when the Constitution was framed" we reach the same result. If the limitations of the power of Congress as defined by the Constitution were to be enforced and individual rights were to be protected accordingly, some tribunal must determine when these limitations were exceeded. Naturally it could not be a State tribunal, for that would enable the States to override all Federal authority. The power could not be lodged with the Executive for that would be to make him supreme over Congress. It could not be lodged with Congress for that would make it the sole judge of its own authority and enable it to escape all the limitations of its powers; it would thus be supreme over the States. If the Constitution as the supreme law was to be applied judicially in the decision of cases or controversies as against State legislation, upon what ground could it be said that it was not to be applied judicially in the decision of cases or controversies as against conflicting acts of Congress? Were the limitations of the Federal Constitution to be maintained as against the States and not as against those possessed of restricted Federal power? And if the judicial power extended to such cases, the determination of the Supreme Court must be final.

By the Supreme Court itself the question was determined in *Marbury v. Madison* (1803). The reasoning of Chief Justice Marshall's opinion has never been answered. Said the great Chief Justice: "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time be passed by those intended to be restrained? * * * It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act. Between these alternatives there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. * * * If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect? * * * It is emphatically the province and duty of the judicial department to say what the law is. * * * So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty."

The contemporary criticism of the opinion in this case appears to have been directed more to the portion which dealt with the control over cabinet officers than with that which sustained the function of the Court in passing upon the validity of legislation. Jefferson resented Marshall's expression of views relating to the right of the justices of the peace to receive their commissions, questions which under the opinion of the Court were not necessarily involved in the case. * * * The doctrine of judicial review has been maintained for over one hundred and twenty-three years since *Marbury v. Madison* and practically is as much a part of our system of government as the judicial office itself.

How has this authority of the Court been exercised with respect to acts of Congress. In the seventy years between the adoption of the Constitution and the Civil War, only two acts of Congress were held to be invalid; those under review in *Marbury v. Madison* (1803) and in the *Dred Scott* case (1857). Since the Civil War

there have been fifty-three decisions of the Supreme Court adjudging the invalidity of acts of Congress. Of these, twenty-three were decided between 1860 and 1900; since the latter year there have been thirty such decisions. In two of these cases, the first legal tender decision and a case relating to the sale of liquor to Indian allottees, the decisions have been overruled and the acts in question held constitutional.

It may be of interest to mention the nature of the decisions holding acts of Congress invalid, classifying them broadly.

Three of these decisions protect the executive department, relating to acts interfering with the pardoning power and the power to remove officers. There are eight decisions which may be regarded as protecting the judicial power and the jurisdiction of the courts. Seven others grew out of the amendments to the Constitution following the Civil War. Thus, in *United States v. Reese* (1876) the Court decided that the Fifteenth Amendment conferred authority to legislate as to State elections, only to prevent the denial of the right to vote on account of color, race or previous condition of servitude. (Also, *James v. Bowman* (1903)). In *United States v. Harris* (1882) it was held that the Fourteenth Amendment related only to State action and that so far as the Thirteenth Amendment was concerned the statute in question was broader than the Amendment justified. Later, it was decided that the same statute was not separable so as to be sustained in part. (*Baldwin v. Franks* (1887)). In the *Civil Rights Cases* (1883) it was decided that the provisions of the act of March 1, 1875, with respect to the equal enjoyment of the privileges of inns, public conveyances and places of amusement were invalid because of too wide a scope as the Fourteenth Amendment applied only to State action and the Thirteenth Amendment to slavery or involuntary servitude. In 1913 (*Butts v. Merchants Transportation Company*), the court decided that the same act could not be sustained in its operation outside the States, as the provisions of the act with respect to vessels, the District of Columbia and territories, could not be severed from those relating to the States without violating the intent of Congress. In *Hodges v. United States* (1906) it was held that legislation by Congress as to interference with the right of contract, as distinguished from slavery or involuntary servitude, was not authorized by the Thirteenth Amendment.

Twelve decisions may be grouped together as directly supporting the reserved powers of the State. Thus, in *United States v. DeWitt* (1870) a provision of an act of Congress was held invalid which attempted to make it a crime to sell a commodity in the States, the act being neither the imposition of a tax nor a regulation of interstate commerce. In *Collector v. Day* (1871) and *United States v. Railroad Company* (1873), it was decided that Congress could not tax the salaries of State judges or the securities held by a city for municipal purposes. The power to pass a bankruptcy act does not permit an invasion of State authority by making acts a crime which were independent and not in contemplation of bankruptcy (*United States v. Fox* (1878)). The Trademark Act of 1870 was found to be invalid because it impinged on the power of the States and was not limited to interstate and foreign commerce. (*Trademark Cases* (1879).) So the first employers' liability act was beyond the authority of Congress because it was not limited to interstate commerce (1908). In *Coyle v. Oklahoma* (1911) it was held that in exercising the power of Congress to admit new States it was necessary to admit them on an equality with the original States. The child labor acts were held to be unconstitutional, the first (*Hammer v. Dagenhart* (1918)) because it was an attempt to control the State in the exercise of the police power over manufacture within the State, and the second (*Bailey v. Drexel Furniture Company* (1922)) because it sought to interfere with the authority of the State by the laying of a tax not for revenue but as a penalty for the violation of a regulation outside the scope of Federal power. On a similar ground (*Hill v. Wallace* (1922)) a tax on grain involved in contracts for future delivery, imposed by way of penalty, was found to be an invasion of the rights reserved to the States by the Tenth Amendment. Another decision to this effect under the same act of Congress was rendered in *Trusler v. Crooks* (1926). The court decided in *Newberry v. United States* (1921) that the control over the times, places and manner of holding elections for Senators (Art. I, Sec. 4) did not extend to the processes of nominating candidates. As Justice McReynolds said in delivering the opinion of the Court: "The history of the times indicates beyond reasonable doubt that, if the Constitution makers had claimed for this section the latitude we are now asked to sanction, it would not have been ratified." The authority was limited to the election itself.

There have been thirteen decisions which may be broadly classified as holding the provisions of congressional acts invalid because repugnant to the guarantees of personal liberty; that is, with respect to trial by jury, unreasonable searches and seizures, self-incrimination, confrontation of witnesses, liberty of contract, reasonable certainity in defining offenses, and the necessity of a proper hearing in the enforcement of liability to a penalty. In three other cases acts of Congress have been adjudged invalid as an unconstitutional deprivation of property. The remaining decisions in which congressional acts have been found by the Supreme Court to lie outside the limitations of the legislative power are the income tax case (1895), prior to the Sixteenth Amendment, relating to a tax laid, without apportionment, on the income of property by virtue of ownership; the decisions as to stamp taxes on articles exported from any State; and the case, (1920) subsequent to the Sixteenth Amendment, invalidating a tax on stock dividends which were not income.—*Extracts.*

The Supreme Court
As it is Today

by Mark Sullivan

WHAT is here said about the Supreme Court of the United States is limited to a few superficial considerations. They have mainly to do with the intellectual complexion of the court as a whole—its complexion not in the political sense of Republican and Democratic, but as respects the classification expressed as "conservative" and "liberal," or to use a terminology much more new and increasingly in use lately, "right" and "left."

"Republican" and "Democratic" have never had any meaning on the Supreme Court. I say "never." The words have not had meaning during the 2-odd years I have been fairly familiar with the court. I have not, for the purpose of this article, gone into history; but such offhand recollection of historical reading as comes to my mind does not recall any justice who, after being on the court, was ever charged by even the most suspicious partisan with having permitted his judicial actions to be influenced by his previous affiliation with the Democratic or Republican party.

It is true that the bent of men's minds carries them naturally into the category of conservative or "liberal." (I shall explain in a moment that I think the word "liberal" has become obsolete.) Two words for the same classification which appear with increasing frequency in American political discussion are "right," meaning "conservative"; and "left" meaning the opposite of conservative, meaning sympathetic to change. I do not like these new words; but if I explore my mind candidly I find the chief reason for my distaste is not much more than the fact that the words are recent importations from Europe. I think this distaste is based, in turn, on a feeling that the type of politics and party organization which prevails on the European continent and which is expressed in these terms "right" and "left," is ill-adapted to America. If ever the politics of the United States becomes wholly a case of "right" versus "left" instead of as traditionally, Democratic versus Republican, things will be very different with us.

Be that as it may, the fact is this new terminology from Europe is increasingly used in the United States. Five years ago, only a New York person, or an academic one familiarly well-read in European politics, would have used or understood the words "right" and "left" in a political meaning. Yesterday I received a letter from Des Moines which discussed whether President Roosevelt in his future political course, under pressure of circumstances or by his own inclination, is likely to go "to the right" or "to the left." That is something new; I suppose we might as well get used to it.

I should like, however, to appeal to some Supreme Court of etymology against a completely perverted use now being made of the word "liberal."

I should like to ask the court to decide whether some who are now describing themselves as "liberals" are not guilty of etymological larceny. "Liberal" as a political term is associated with "liberty"; both come from the same Latin word, "liber," meaning "free." For some centuries, ever since Magna Charta, "liberal" was an accurate political designation for those who demanded change. It was accurate because throughout all that period the demand for change was a demand for greater liberty for the individual, the "liberties of the people." At all times it was a struggle to take power away from the State, from the King, and confer it on the people, on the individual. In that long historical struggle it was natural that the partisans of change, the partisans of the new order, should have called themselves "liberals." The thing they fought for was freedom of the individual from the authority of the State, liberty for the individual—and "liberal" was a proper designation of those who fought for it.

But in the struggle now going on in America, in the issues which the Supreme Court will shortly act upon, the situation is reverted. In the most concrete way in American history, and I think since Magna Charta, the state—that is the American Government—is now trying to assert an extension of power, economic power, over the individual. In the present struggle in America the contrast is between an old conception marked by maximum liberty for the individual—and a proposed new conception marked by constraint upon the individual by the state. In the discussion that rages about this I find that those who favor the new call themselves "liberals!" That is, the word "liberal" is used on the side which means constraint upon the individual. It would be more accurate, it seems to me, if "liberal" were on the same side that includes "liberty." The new order now proposed in America is in the direction of more power for the state, less liberty for the individual. In this new line-up, this reversal of the old conceptions, I suggest the word "liberal" belongs, not on the side of the new, but on the side of the old. The ancient and honorable word is being used for a thing which is the exact opposite of what the word stood for when it acquired its ancient esteem. The result is, in this present struggle through which America is passing, it sometimes happens that scratch a "liberal" and you will find a Mussolini or a Hitler. Those who favor the old way in America, the way of maximum liberty for the individual, are entitled to call themselves "liberals." And they are entitled to call their opponents "reactionaries"—reactionaries whose reaction would go all the way back to pre-Magna Charta days, when the state, the King, had a power which we have spent some centuries taking away from it.

The intellectual complexions of the nine men who compose the Supreme Court may accurately be described as falling into two groups, or three, "Conservatives" is the word commonly used for those who stick closest to the Constitution. The other group, for lack of a more exact word, may be called "progressive." A safe word for them might be "non-conservative."

There are, of course, infinite shadings between those words, and between the groups they describe. To classify

the justices as one or the other involves more exercise of etymological judgment than can be exact. In print and in current talk, it is commonly said that four of the justices are conservative, three are progressive and two stand between. The conservatives, as usually named in offhand groupings, are Justices Van Devanter, Sutherland, McReynolds and Butler. The progressives are Justices Brandeis, Stone and Cardozo. The ones who stand between are Chief Justice Hughes and Justice Roberts. If, in any decision, the line-up between conservatives and non-conservatives is clear, and if the two middle-ground justices go together one way or the other, that side wins. It is a pretty satisfactory situation.

A characteristic and fairly recent decision was about an Indiana statute imposing a graduated tax on chain stores, the size of the tax on each store becoming larger in proportion to the number of stores under one ownership. In this case the four conservatives contended that the law was unconstitutional. The three progressives upheld the law. (At that time Justice Cardozo had not been appointed; his predecessor, Justice Holmes, was also a progressive.) The two who occupy the middle ground intellectually, Chief Justice Hughes and Justice Roberts, sided with the progressives and made a majority which upheld the law.

This line-up—the two middle-ground justices siding with the three progressives and making a progressive majority of 5 to 4—has become characteristic lately. It is not, of course, uniform. Sometimes one of the middle-ground justices goes one way and one the other. Occasionally the two middle-ground justices go with the conservatives. By no means all the questions before the court are constitutional. Of those that are, not all are delicately balanced between conservative and progressive. Many decisions are unanimous, some are 8 to 1 or 7 to 1.

But the type of decision here described has become noticeably usual—the four conservative justices going one way and composing only a minority, while the three progressives and the two middle-ground justices unite to make a majority.

The questions that will be thrust upon the Supreme Court by what the Government is now doing, are numerous, and they go deep. In the discussion provoked by these new Government activities, it is commonly said that the Supreme Court must decide whether America is to be individualist as in the past, or collectivist; that a country cannot be half individualist and half collectivist, half American and half Russian.

That, like most epigrams, is but a half-truth, and like all half-truths, misleading.

By a process very slow, very gradual, and completely wholesome, one industry after another in America has been taken out of the field of unrestrained individualism and put under State control. An early one was railroading. A little later the public utilities were put under State control.

Just lately, even before the present administration took power, certain other industries were on the border line between those completely individualist, and those State-controlled. Some two years ago, one of these borderline cases came to the Supreme Court from Oklahoma. The State of Oklahoma, in effect, made the manufacture of ice a public utility; and required that no one could set up a new ice plant in Oklahoma until after getting consent from the State government, as in the case of public utilities. An enterprising individual started an ice plant without asking consent from the State government. In due course the case came before the Supreme Court. In the court the majority decision was to the effect that ice-making is not yet a public utility; that any individual wishing to do so could invest his money in building an ice plant, and could operate it without interference. But a strong argument to the contrary was made in a dissenting opinion by the progressives on the court.

Many of the questions that will now go before the Supreme Court as a result of N. R. A. are in this field. N. R. A. indirectly—this is stating it very loosely and not in terms of legal thought—has the effect of putting many ordinary businesses into a status resembling that of public utilities, or otherwise putting private businesses under a measure of State control. If N. R. A. were to go the full length of some who speak for it, every business would be put under Government control; and it would be illegal for a man to set up a new grocery store without first getting, in effect, consent of the Government.

This is one broad issue that will come before the Supreme Court; whether America shall go on with a gradual and orderly process of adding one industry at a time to the category of public utilities, presently ice manufacturing, pretty soon milk distribution—or whether, as N. R. A. implies, America shall make one broad jump, taking practically all industries and occupations into the field of public control.

Much of the talk about the Supreme Court deals with the opportunity President Roosevelt may have to make changes during the time he is in the White House, whether that be one term or two terms lasting until 1941. To be very elementary about this, the President has no power; of course, to remove a judge—a judge can be impeached only by a Congress and in the process of impeachment a President has no part. But this is purely academic. Nobody anticipates any change in the Supreme Court except such as may come through death or retirement. Some self-chosen and radical spokesmen of the "new deal" make excited suggestions about what Congress, under Mr. Roosevelt's leadership, may do to change the complexion of the Supreme Court, or to abridge its powers. No such suggestion comes from Mr. Roosevelt; and it is safe to assume that such suggestions are very distant from reflecting the President's mind. Such changes as President Roosevelt may make in the court will be limited to filling vacancies caused by death or retirement.

Justices of the Supreme Court can retire with pay, if they wish, upon two conditions—they must have reached the age of 70 and they must have served on the court for 10 years.

Of the nine justices, four meet these conditions at the present time. For each comparatively slight and inexact significance as it may have, their former political affiliations and their intellectual leanings as between conservative and progressive, are given:

Justice Louis D. Brandeis of Massachusetts, born 1856, now 77 years old; appointed to the court 1916, has served 17 years. Democrat, progressive.

Justice Willis Van Devanter of Wyoming, born 1859, now 74 years old; appointed 1910, has served 23 years. Republican, conservative.

Justice James Clark McReynolds of Tennessee, born 1862, now 71 years old; appointed 1914, has served 19 years. Democrat, conservative.

Justice George Sutherland of Utah, born 1862, now 71

years old; appointed 1922, has served 11 years. Republican, conservative.

But while attainment of the age of 70, and 10 years of service, gives a justice the option to retire, there is no requirement on him, either of law or of custom. Indeed, the precedents are to the effect that justices do not and are not called upon to take account of any fixed year in their sojourn upon earth as the time when they should decide no longer to be judges. The last occasion when a justice retired voluntarily was that of Justice Oliver Wendell Holmes, and he had reached the age of 90. That was 20 years after he had had the option to retire, and during all those 20 years the attitude of his fellow justices, of the bar and of the public was one of satisfaction that he continued to keep his learning, his experience and the extraordinarily fine quality of his mind available for the public service. It is not possible, therefore, to anticipate necessarily that any vacancies on the court will occur through retirement. What we can anticipate is a Supreme Court not changed in personnel except as death may do so, not materially changed in thought, passing on all these new questions with the court's habitual serenity, guiding America through a wholesome process of gradual evolution.—*Extracts, see 3 p. 320.*

The Present Membership of the U. S. Supreme Court

The Chief Justice

CHARLES EVANS HUGHES: Republican, born Glen Falls, N. Y., April 11, 1862; LL.B. Columbia University, 1884; Governor of New York, 1907-1910; appointed Associate Justice, U. S. Supreme Court by President Taft, May 2, 1910; resigned June 10, 1916 to accept Republican nomination for the Presidency; appointed U. S. Secretary of State, March 5, 1921; U. S. delegate to and chairman of, the Conference on Limitation of Armament, Washington, 1921; special ambassador to the Brazilian Centenary Celebration, Rio de Janeiro, 1922; chairman, New York State Reorganization Commission, 1926; chairman, U. S. delegation to Sixth Pan American Conference Havana, Cuba, 1928; U. S. delegate Pan American Conference on Arbitration and Conciliation, 1928-9 Washington, D. C.; member of Court of International Justice, 1928-30; appointed, by President Hoover, Chief Justice of the United States, February 3, 1930, confirmed by the Senate, February 13, 1930.

The Associate Justices

WILLIS VAN DEVANTER: Republican, born Marion, Ind., April 17, 1859. Graduate, Law School Cincinnati College, 1881, Chief Justice, Wyoming, 1889-90; U. S. Assistant Attorney General, 1897-1903; appointed U. S. Circuit Judge by President Theodore Roosevelt, 1903; Appointed Associated Justice, Supreme Court of the United States by President Taft, December 16, 1910.

JAMES CLARK MCREYNOLDS: Democrat, born Elkton, Ky., Feb. 3, 1862; Graduate University of Virginia law department, 1884; Assistant Attorney General of the United States, 1903-1907; appointed Attorney General of the United States by President Wilson, March 5, 1913, and Associate Justice of the Supreme Court of the United States, August 29, 1914.

LOUIS DEMBITZ BRANDEIS: Democrat, born Louisville, Ky., November 13,1856; attended Annen Real Schule in Dresden and Saxony, 1873 to 1875; LL.B., Harvard Law School, 1877. Appointed Associate Justice of the Supreme Court of the United States by President Wilson, January 28, 1916.

GEORGE SUTHERLAND: Republican, born March 25, 1862, Buckinghamshire, England; law student at University of Michigan, 1882-3. Appointed by President Harding to be Associate Justice of the Supreme Court of the United States, September 5, 1922.

PIERCE BUTLER: Republican, born March 17, 1866, Waterford, Minn. Graduate of Carleton College in 1887; Nominated by President Harding to be Associate Justice of the Supreme Court of the United States, November 23, 1922.

HARLAN F. STONE: born in Chesterfield, N. H., Oct. 11, 1872. LL.B. 1898 Columbia Law School; appointed Attorney General of the United States April 7, 1924; nominated Associate Justice of the S. C. of the United States by President Coolidge, January 5, 1925, confirmed by Senate, February 5, 1925.

OWEN J. ROBERTS: Republican, of Philadelphia, Pa., born May 2, 1875. LL.B. University of Pennsylvania, 1898; appointed special deputy attorney general to represent the United States in prosecution of cases arising under espionage act in eastern district of Pennsylvania during the World War; also represented the United States Housing Corporation in Philadelphia; appointed by President Coolidge one of two attorneys to prosecute cases arising under leases of Government lands in California and Wyoming, in 1924; nominated Associate Justice of the Supreme Court of the United States by President Hoover, May 9, 1930; Confirmed by the Senate, May 20, 1930.

BENJAMIN N. CARDOZO: Democrat, born in New York City, May 24, 1870; A. M., Columbia University, 1889, admitted to the bar, 1891. Elected Justice of the Supreme Court of New York for term beginning January 1, 1914; designated by the Governor to act as Associate Judge of the Court of Appeals of N. Y., Feb. 2, 1914; elected Associated Judge of the Court of Appeals for term beginning Jan. 1, 1918; Elected Chief Judge of the Court of Appeals for term beginning Jan. 1, 1927; nominated by President Hoover February 15, 1932, Associate Justice of the Supreme Court of the United States, and confirmed by the Senate, Feb. 24, 1932.

Provisions of the National Industrial Recovery Act—"N.I.R.A."

THE following summary of the provisions of Title I of the National Recovery Act of June 16, 1933, prepared and presented to the House by Representative Samuel B. Hill, Democrat, of Washington, member of the Ways and Means Committee of the House, covers only that portion of the Act under which the National Recovery Administration—NRA—was established. Title II of the Act provided for the Public Works Administration, while Title III covers amendments to the Emergency Relief and Construction Act and other miscellaneous matters not involved in the discussion of Constitutionality.

TITLE 1

Section 1. Declaration of policy.

Section 2. Administration agencies.

Section 3. Codes of fair competition. (a) Approval of such codes by the President.

(1) When no inequitable restrictions are imposed on admission to membership, and that those presenting such code to the President are fairly representative of such trades or industries.

(2) That such codes are not designed to promote monopolies or to eliminate or oppress small enterprises (spirit of antitrust laws is preserved hereunder).

(b) Upon approval of such code by the President such code shall be the standards of fair competition in commerce for such trade or industry.

(c) Terms of code of fair competition enforceable through Federal district courts.

(d) President may prescribe and approve a code of fair competition where the trade or industry has not presented such code to him on its own initiative. Public notice and hearing prerequisite for such action by President.

Section 4 (a). President authorized to enter into voluntary agreements between or among persons engaged in trade or industry, labor organizations, and trade or industrial organizations, associations, or groups, if such agreements will aid in effectuating the policy of title I with respect to interstate commerce and will not promote monopolies or oppress small business enterprises.

(b) President may require business licenses in order to effectuate a code of fair competition or an agreement under this title. Such license requirements shall be imposed only after public notice and hearing and a proclamation of such requirement.

Section 5: During the effective period of title I and for 60 days thereafter any approved code, agreement, or license thereunder exempts from the provisions of the antitrust laws.

Section 6: Limitation of benefits.

(a) Trade or industrial association or group must furnish to President such information as he by regulation may prescribe.

(b) President authorized to prescribe rules and regulations designed to insure that any organization availing itself of the benefits hereunder shall be truly representative of the trade or industry represented by such organization.

(c) Federal Trade Commission directed make such investigations as President may require for purposes of this title.

Section 7: (a) Conditions of Code of fair competition, agreement and license.

(1) Right of employees to organize and bargain collectively.

(2) No employee or one seeking employment shall be required as a condition of employment to join any company union or refrain from joining any labor organizations of his own choosing.

(3) That employers shall comply with maximum hours of labor and minimum rates of pay, and so forth.

(b) President shall allow so far as practicable employers and employees to establish by mutual agreement standards as to maximum hours of labor, minimum rates of pay, and other working conditions, and such standards when approved by the President shall have the same effect as a code of fair competition.

(c) Where no such agreement has been approved by the President, he may investigate the labor practices, policies, wages, hours of labor, and working conditions in a trade or industry and, after hearings, may prescribe a limited code of fair competition fixing the maximum hours of labor, minimum rates of pay, and other working conditions in such trade or industry.

Section 8: This title shall not be construed as repealing or modifying any of the provisions of the Agricultural Adjustment Act, approved May 12, 1933.

Section 9: (a) President is empowered to prescribe necessary rules and regulations to carry out the purposes of this title, and fees for licenses and for filing codes of fair competition. The violation of any such rule or regulation is punishable by fine or imprisonment or both.

(b) The President may from time to time cancel or modify any order, license, rule, or regulation issued under this title.

PRO — Are the Provisions of the National Industrial Recovery Act Constitutional?

by Donald R. Richberg

General Counsel "NRA"

Arguments Favoring

THE legal problems of the National Recovery Administration revolve around two major questions:

First, how shall the law be interpreted and applied so as to accomplish its objects?

Second, how shall the administration of the law be kept within the limitations of the Constitution of the United States?

If it were true, as recently asserted by a conspicuous lawyer, that the Recovery Act made the President, "the economic dictator of American industry" then the problem of interpreting the law would be simplified, but the problem of sustaining its constitutionality would be difficult indeed. Happily the law does not create a Presidential Dictatorship; and no effort has been made to use any of the powers conferred upon the President in an arbitrary or dictatorial manner. Every power conferred in the law can be exercised within the boundaries of the Constitution; and it is the accepted duty of the Recovery Administration to stay within those boundaries.

The Act does create a machinery for the self-government of industry, with a limited measure of public supervision which is carefully designed to provide only those restraints and compulsions which are essential to protect private rights and to safeguard fundamental public interests. These exertions of the authority of the federal government all follow well-worn paths of law making within the limitations of the federal constitution.

Let me indicate the location of these well worn paths:

1. The Congress of the United States is expressly granted the power to regulate interstate and foreign commerce. This is a plenary power to take all measures necessary and appropriate to foster and protect interstate commerce and to regulate transactions within a state which have an injurious effect upon interstate commerce. The word "commerce" covers all varieties of traffic in commodities and includes transportation.

2. The Congress is expressly granted the power "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States." This language may or may not be construed to confer a broad power to pass any laws necessary to provide for the general welfare. But under either construction it amply supports the validity of the Recovery Act as an emergency measure; since even the exercise of the power to collect taxes, and the very existence of the government, depended in the emergency on its ability to restore the volume of business and the orderly exchange of products necessary to sustain the population.

3. The Government of the United States, and every other government possesses the inherent power of self-preservation. This is writen into the Constitution not only in precise grants of authority, but by necessary implication from the creation of a sovereignty. The power to regulate commerce, the power to lay and collect taxes, *and the obligation to guarantee to every state a republican form of government,* all comprehend the power to enact and to execute the laws necessary to preserve the institutions of government which are established in the Constitution for the purposes stated in its preamble.

4. The Congress is also expressly empowered "to coin money" and to "regulate the value thereof"—and the implications of this power have received, so far as I am aware, no consideration from those who have questioned the validity of the Recovery Act. But it has been universally recognized that the regulation of the value of money is a necessary part of any program of economic recovery. The difficulty of regulating the value of money by the gold standard has bee nincreased by the lacy of a definite relationship between a quantity of gold, which is used as a token of value, and a quantity of human labor which is the persistent actual standard of the value of goods and services. It should not be necessary to indulge in an elaborate discussion of economic theories to demonstrate that the federal government would be acting within its acknowledged powers in seeking to relate the value of money to a certain quantity and quality of labor, and that one appropriate method to employ would be to establish a basic standard of maximum hours and minimum wages for labor. The establishment of such a standard would play a useful part in regulating and stabilizing the value of money.

It is well understood that the powers of the federal government which are granted in one section of the Constitution, must be exercised within the limitations imposed by other sections; and the legal problems of the Recovery Administration arise principally in the application of this principle. The power to regulate commerce for example is conceded; but it cannot be so exercised as to deprive anyone of life, liberty or property without due process of law. Before we enter, however, the twilight zone of the validity of the *administration* of the law let it be made clear that the Congress had the power to enact the law.

For this purpose it may be helpful to consider the Recovery Act primarily as the exercise of the power to regulate interstate commerce for the purpose of furnish-

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Are the Provisions of the National Industrial Recovery Act Constitutional?

CON

Arguments Opposing

by James M. Beck

U. S. Representative
Pennsylvania, Republican

THE shadows of a lasting night are falling upon the old constitutional edifice, which the genius of Washington, Franklin, Madison, Hamilton and Jefferson helped to build. While Jefferson was not a member of the Constitutional Convention, his ideal of liberty was one of its inspirations, and it might be well to recall, as we consider the nature of this bill, those noble words of the first inaugural, which I may commend to the disciples of Jefferson, when he said that his ideal of a true republic was a "wise and frugal government, which would restrain men from injuring each other but otherwise leave them free to pursue their own pursuits of liberty and industry, and shall not take from the mouth of labor the bread it has earned." I quote from memory, but with substantial accuracy. But from that high ideal this country has long since departed, and we are now about to transform a representative democracy into a virtual dictatorship in the vital matter of industry.

It cannot be said that if we are passing from an old order to a new order that such a fate was not within the anticipation of the fathers. Washington, in his Farewell Address, said pointedly that when one department of government usurped the functions of another, and constitutional limitations were no longer respected, representative government would cease and the Constitution would be "undermined." Such was his expression, and I quote his words:

After warning all succeeding generations of Americans that "the habits of thinking in a free country should inspire caution in those entrusted with its administration to confine themselves within their respective constitutional spheres; avoiding in the exercise of the powers of one department to encroach upon another—"

And after further warning that such spirit of encroachment "tends to consolidate the powers of all the departments in one and thus to create, whatever the form of government, a real despotism—"

Washington added:

"If in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed."

Franklin in the last days of the convention, when with tears in his eyes he besought the members to sign the compact, said in substance that this Government would last "as long as there was any virtue in the body of the people," but when that was wanting the Republic would become a despotism.

In the vital matter of industry we are about to yield to a virtual despotism in this country.

So that all that is now happening is what the fathers expected to happen, if the people of the country were unworthy of the priceless heritage that was handed to them in the Constitution of the United States.

We are going to have a new Constitution, not formally framed or ratified, but by executive usurpation. If you read in the New York Times recently interviews of the members of the Cabinet and supermembers of the Cabinet, who although they nominally occupy lesser positions than heads of departments, are more powerful than the Cabinet, you will see a frank acknowledgment that the old order had passed, and that an entirely new order was about to begin. If so, we ought to frankly realize the reality and adopt a new Constitution, in order that we shall not live under the hypocritical pretense of having one kind of Government in practice and having another in theory.

While I do not see the prospects of any master architect that will be able today to rebuild upon the old foundations of the Constitution a new Constitution with the same wisdom as the master builders of 1787, yet the "brain trust" is ceaselessly at work "undermining" our Constitution, to use Washington's phrase. They work silently but none the less effectually. In this construction of a new form of government—now in progress—Professor Moley will be in the place of George Washington, and Professor Tugwell in the place of Hamilton, and Professor Berle in the place of James Wilson, and the old architects must yield to these new architects who, fresh from the academic cloisters of Columbia University, and with the added inspiration of all they have learned in Moscow, are now intent upon rebuilding upon the ruins of the old Constitution a new Constitution, in which, as in the old German Reichstag, this Congress will be merely a debating society, and the Executive will be master of the destinies of the American people.

In a sense, the President is not an usurping dictator, for the unprecedented powers which he has now gained were given to him by Congress and could be taken from him by Congress; but it is true that the President will exercise over production, transportation, banking, and other instrumentalities of commerce greater powers than those enjoyed by all his predecessors, either in times of war or peace. In that sense he will be the economic dic-

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ing relief from an intolerable disorganization of commerce, caused by the failure of private commercial enterprises to provide those opportunities for employment and those exchanges of goods and services which were necessary to sustain at least one-third of our population.

There are two devices adopted by those who question the constitutionality of the Act as a whole. One is to misinterpret the powers it confers and to assume that it creates a dictatorship. On this misinterpretation and false assumption it is easy to erect a ponderous mass of precedents to show that the dictatorship would be unconstitutional.

The other device is to denounce every restraint upon individual action as a deprivation of personal liberty or the destruction of a property right. This latter argument ignores the profound truth that the freedom of one individual is always dependent upon the restraint of others. For the same reason the preservation of property rights commonly depends upon restraints upon the exercise of property rights.

It is always possible for the shallow reasoner to argue that the restraining features of a law will interfere with the freedom of the individual, although the ultimate purpose and effect of the law is to make good the constitutional guarantees of liberty. On the other hand every genuine authority on constitutional law recognizes that it is only by the imposition of restraints upon all others that the liberty of the individual is secured; and that the constitutional guarantees of liberty can be made good only by laws imposing restraints upon the anarchy of unregulated individual action.

Surely no business man would listen patiently to the argument that laws prohibiting forgery, embezzlement, libel, blackmail and fraud are unconstitutional restrictions of individual freedom. But all such laws impose very serious restraints upon rugged individualism. Of course, the provisions in a code of fair competition forbidding rebates and discriminations as unfair trade practices, restrict individual liberty; and so do the long established provisions of the Interstate Commerce Act which forbid rebates and discriminations by common carriers.

To distinguish these two cases an intelligent lawyer may talk learnedly about the public obligations of a common carrier and dull or cunning lawyer may demand to know whether we are proposing that all private business should be treated as a public utility and subjected to government control? And then the oratorical members of the bar may rise and denounce us as advocates of Socialism and call upon all good men and women to gather in defense of the Constitution and the flag. But all such discussion evades the real issue, which is simply this:

It is necessary to restrict individual freedom to do a particular thing in order that the freedom and security of all to do many other things may be protected? Security and freedom are inseparable. The freedom of individuals today depends not only on security from physical violence, but also on economic security. Those practices which definitely destroy the economic security of great masses of people are clearly destructive of their liberty. In this situation there is neither logic nor legal foundation for the contention that a few individuals have a right guaranteed by the Constitution of the United States to engage in business practices which inevitably destroy the economic security and the freedom of all others engaged in such a business. Such a construction of the Constitution would make it a charter of anarchy instead of a covenant of law and order.

You might just as well argue that individual freedom to forge documents or to embezzle money is guaranteed by the Constitution. Of course, a question can be raised as to whether a particular restraint upon dividual freedom is necessary to preserve freedom. The decision should depend upon determining whether the net result is a gain or a loss of freedom. The question should be decided on a scientific weighing of the evidence. If the balance is close, then the legislative judgment should be decisive. It is only when the legislature has clearly taken away a more valuable freedom than has been conferred that the Court has the basis of a declaration that the Constitutional guarantee has been violated.

It should be evident that no well informed and candid expounder of constitutional law will undertake to pronounce the National Industrial Recovery Act as a whole unconstitutional. The national emergency was met by an exercise of the constitutional powers of Congress. In the creation of the National Recovery Administration no dictatorial powers were conferred upon or usurped by the executive. But the emergency called for the exertion of legislative and executive powers in a manner and through agencies, and with a sacrifice of formalities and minor interests, which would not be necessary and might not be justified in a time permitting of more leisurely action.

One simple example may make clear this distinction. A group of old wooden buildings may increase the fire hazard of a large residential area. But to remove them in a lawful manner requires judicial proceedings with notice and opportunity to be heard—and may require the payment of compensation for property taken for a public use. Orderly government and the preservation of the constitutional rights of the individual makes necessary this slow and careful process, although meanwhile the safety of a community may be continuously threatened.

But suddenly fire starts and, sweeping toward these old buildings under a high wind, creates the menace of a city wide conflagration. The emergency powers of self-preservation spring to life. The fire department rushes in dynamite the buildings and to deluge the ruins with water to block the march of the devastating flames. Does any lawyer stand in the middle of the street declaiming about "due process of law" and the sacred rights of private property and the liberty of an individual? Does any judge hastily convene court in his bedroom and issue an injunction to prevent the fire marshal from usurping dictatorial powers which never were authorized by those who wrote the Constitution?

The truth is that wherever orderly government has

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tator of America.

Now a dictator, whether his power rests upon force or the voluntary acquiescence of the people, has a supremely difficult task. Even in a country that is homogeneous and whose economic interests are in harmony, such a dictator treads a dangerous path. To be a successful dictator in a country whose population is heterogeneous and whose economic interests are in conflict is an almost impossible task. The difficulty with a dictatorship is that in assuming all power, he accepts all responsibility.

While the present revolution in our political form of government is specific and may represent the general will, yet it no longer remains what it was, any more than the form of government in Italy was the same after parliamentary government was abolished and all power was vested in a dictator. If such powers succeed, or seem to succeed in ending the depression, the American people will not, I fear, be greatly concerned about the change in our form of government, for at present they feel that any port is good enough in a storm.

The change has some justification in greater efficiency of administration, but the Constitution refused to sacrifice security for efficiency. The justification of our old form of government was that there was greater security in the composite judgment of the Congress than there could be in the judgment of an individual, who, for a time, was President of the United States. A Cæsar may be far more efficient than a senate, but the Roman Republic came to an end when the policies of Rome were determined by Cæsar and not by the senate.

The Constitution was called into existence to insure the freedom of commerce between the States. Before it was adopted every State burdened the free flow of commerce with conflicting and hostile regulations. To emancipate commerce the power to put it into shackles was taken from the States by the simple grant that Congress should have power to regulate such commerce. It was never intended that Congress should then proceed to put upon commerce the very shackles that it had been created to destroy.

In the absence of any Federal regulation it was held by the Supreme Court that the failure of Congress to exercise its power of regulation was its mandate that commerce should be free, and for 100 years this policy of freedom remained, and under it a great continent was conquered, the Atlantic and Pacific linked by steel rails, and the Republic became one of the greatest nations in the world.

Exactly one century after the Constitution was adopted Congress abandoned that policy and began to forge the chains for commerce by bureaucratic regulation. That year it created the Interstate Commerce Commission, and this was followed in 1890 by the Sherman antitrust law, which vainly attempted to limit the inevitable tendency of business to combine into larger units. Ever since there has been an ever-increasing regulation of American business by Federal bureaus.

In the first century of the Republic it was generally recognized that Federal powers could only be exercised to accomplish Federal purposes, but the destruction of the Constitution began when Congress entered upon the destructive policy of utilizing Federal powers to usurp the powers reserved to the States. For example, it was soon seen that if Congress could appropriate moneys for non-Federal purposes without challenge, it could supervise the use of such moneys and thus usurp fields of power which were the exclusive province of the States.

About a generation ago it was asserted that Congress could deny the privilege of engaging in interstate commerce to anyone who did not conform to the views of Congress as to the methods of production. This heresy has now been carried to the extreme of holding that no one can engage in interstate commerce as of right, and that the Government may license or refuse to license a citizen to engage in interstate commerce. Such a right was not created by the Constitution. Indeed, it is one of the natural rights which are included in the solemn guaranty of the right to "life, liberty, and the pursuit of happiness," but the theory of the National Industrial Recovery Act is that unless the manufacturer conforms to the wishes of the Federal Government in regard to the hours of labor, his maximum output, a minimum-wage law, and other restrictions, he cannot only be proscribed by his own Government, but denied the privilege of selling his products in interstate trade.

This is economic slavery. It destroys not merely the rights of the States but the basic freedom of the individual to engage in lawful occupations. It concerns both employer and employee, and, to quote Jefferson's words in his first inaugural, it "takes from the mouth of labor the bread it has earned."

Let me make a passing reference to an interesting radio speech of our President. It was both adroit and ingratiating.

The address, in most respects admirable in form and substance, seemed to me to contain one disingenuous suggestion, which was the more dangerous because of the irresistible charm of the speaker.

He calmly assured his countrymen that in this emergency legislation there has been "no actual surrender" by the Congress "of power." The President said:

"Congress still retains its constitutional authority, and no one has the slightest desire to change the balance of these powers."

This means that when the Constitution imposes a direct duty upon Congress, as to regulate the value of currency or to impose taxes, it exercises that power when it turns over to the President or some executive official the absolute power to exercise it. In other words, the abdication of a power is the exercise of the power.

Such a doctrine is a complete destruction of the division of powers as prescribed by the Constitution. It is the present German idea of constitutional law for the German Parliament, in one sweeping delegation of power to the Chancellor, gave him complete power to make any laws, although the legislative power, under the Weimer Con-

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been maintained the emergency powers of government to prevent physical destruction and disorder have always been recognized. When destructive natural forces are released, such as earthquakes, fires, pestilence, cyclones and volcanic eruptions, or when human violence is unleashed and mobs, or organized masses of men, threaten the safety of the people and the existence of government, there is general agreement that legislative and executive authority must be extended, and the exertion of political power must be speeded up, to meet the imperative demands for action.

But, with the rise of industrial civilization a new danger has come to threaten the freedom and security of the people of a great nation and to undermine the foundations of their government. The economic independence of the individual has largely disappeared. The ability of a family to obtain food and clothing and to maintain a shelter has come to depend upon the continuous operation of a vast and complicated economic structure. Even the farmer cannot sustain a tolerable existence without exchanging the products of his labor for the products of other labor on a fair basis of exchange. The city worker's life depends upon his attachment to a job just as an unborn child must draw sustenance through the umbilical cord.

In this modern world a breakdown in the economic system brings disaster that spreads with the rapidity of fire or pestilence, that leaps from city to city, devastating rural areas in its passage. Not even the world war caused the misery, the suffering and the ruin of lives brought about by the world depression. We mobilized millions of men and spent billions of dollars to protect the nation from a menace far more remote than the economic collapse which threatened us in the year 1933. A blockade of our coasts and interference with foreign commerce would not have brought the suffering to millions of our people that economic obstructions to interstate commerce actually produced in the years of the Depression.

The regulation of interstate commerce in the early years of the republic called for little more than regulating means of transportation and prohibiting obstructions to traffic and transportation between states. The town and the surrounding country were largely self-sustaining. There would seem little reason for the federal government to be concerned with a monopoly of oil or tobacco, or with a strike of coal miners, that might restrain interstate commerce. But by the end of the nineteenth century it became apparent that the power to regulate interstate commerce must be exercised to an extent never imagined by our revolutionary forefathers, in order that economic diseases might not destroy the economic and political life of the nation.

The power to regulate interstate commerce, originally designed to promote the economic unity of the nation, has become an essential political power to preserve the economic health and the very existence of the nation. Those who would circumscribe and weaken the exercise of this power for the temporary selfish advantage of an individual, a community or a political party, should pause long enough to realize that only the orderly and equitable exchange of goods and services, unhindered by the artificial barriers of state lines, can insure to the vast majority of one hundred and twenty million people food and fuel and the other necessities of daily living. In the complexities of modern life it is not enough merely to prevent obstructions to transportation, or to provide safeguards against the destruction of commerce by the forces of nature or by organized human violence. It is necessary today to maintain orderly relations between the business enterprises through which goods and services are produced and exchanged. Interstate traffic must be continuously sustained; and when the uncoordinated exercise of individual control over the business units engaged in the production and distribution of the necessities of life becomes self-destructive, when unregulated competition becomes cannibalism, and when an economic system is transformed into economic chaos, measures of political control are as imperatively needed as the traffic policeman and the signal lights in the crowded streets of a great city.

Traffic regulation and "control of transportation" are entirely different. The individual is free to travel where he will; but the means and the speed of his travel may be regulated for his own safety and convenience. In the same way regulation of business activities and "control of business" are not the same. It is only the partisan, the ignorant or the shallow critic who condemns as "political control of business" an honest effort to bring order and intelligent planning and cooperative purposes into the anarchy of unplanned, unrelated business enterprises upon which the welfare of all the people depends.

The national emergency called for more speedy, more peremptory measures for the regulation of commerce than would be necessary or appropriate in normal times. But the underlying prinicples of the National Industrial Recovery Act are principles for the regulation of interstate commerce which are essential to the welfare of the people for the "long pull," as well as for the short pull out of the Depression. The emergency calls only for an accelerated effort, for a reasonable, but not an arbitrary, sacrifice of minor interests. It would be as sensible to argue that we approve of dynamiting all old buildings, as a permanent policy, simply because the fire marshal dynamited a few old buildings to stop a conflagration, as it would be to argue that we approve of federal control of all private business, simply because today, to meet a national emergency, we are adopting somewhat drastic and spectacular means of dealing with stubborn headed individuals who are more concerned with having their own way than with helping to restore the prosperity of the nation.

The Recovery Act in fact does not provide for any governmental regulation of business save as a last resort; and the Act has been administered solely as a measure for organizing the separate units of trades and industries into cooperative associations for self-government of their own affairs. The legal problems which have been encountered for the most part have not been problems of

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stitution, was vested in the Reichstag.

About a generation ago I argued a case called "the Lottery case." It was one of the very great cases of the Supreme Court of the United States.

In a sense it is the supplement to, and may rank second in importance to the great case of Gibbons and Ogden, in which the commerce power was first defined.

In the Lottery case I represented the Government and my contention then, which the Supreme Court sustained, was that the power to regulate commerce included the power to prohibit it when essential to Federal ends. But, I said, the right to prohibit was subject to other limitations in the Constitution, and the greatest of all those limitations was obviously the tenth amendment, solemnly but futilely guaranteeing that the rights of the States, and what is more significant, the rights of the people of the States as individuals, should never be taken from them unless by some express grant in the Constitution or by the necessary implication of such grants.

The Supreme Court sustained this contention, and they said in the conclusion of the opinion of Mr. Justice Harlan that while this power to regulate was the power to prohibit, yet, nevertheless, it must be taken as subject to the fundamental liberties of the American citizen and could never be arbitrary or capricious.

Notwithstanding this warning there began to be evolved the doctrine that by the perversion of the commerce power the Federal Government could usurp the reserved rights of the States, that it could go into the States and say to them: You did not properly exercise your reserved police powers to meet this economic evil, or that economic evil, and, therefore, we will now say that either by the power of taxation, the greatest of all Federal powers, or by the power over commerce, we will compel you to do it either at the risk of a prohibitive tax or at the risk of being denied the opportunity to engage in commerce.

That was the doctrine suggested, and it has been the basis of a great deal of subsequent legislation. The decision in the Lottery case, while sound in theory, was one of the most fateful and mischievous decisions in its effect upon the expansion of Federal power that the Supreme Court ever rendered, because it purported to give to Congress this tremendously coercive and tyrannous power over commerce in order to take from the constituent States their reserved rights which we had supposed, vainly supposed, had been guaranteed by the tenth amendment of the Constitution.

Now, we have the full fruitage of the doctrine of the Lottery cases in this legislation. It makes the President the economic dictator of the industrial activities of the American people, as the Congress has already made the Secretary of Agriculture the virtual dictator over the agricultural interests of the country.

But how can the power be exercised? By denying access to the channels of interstate trade; and to deny them such access is, of course, to take from most industries the opportunity to exist, because they cannot exist within the borders of a particular State in these days of mass production.

This is not a case in which you could reason that while the validity of this legislation is doubtful, it can be left to the Supreme Court. This is always a questionable expedient because no concrete case may ever reach the Supreme Court. But in this case there can be no question under later decisions of the Supreme Court that you cannot do what you are trying to do—to make the President the economic dictator of the United States—by putting in his hand the big stick of the commerce power, because in the case of Hammer against Dagenhart it was held that where an attempt was made by the commerce power to coerce the States in the matter of child labor, the Court—although by a bare majority—held that that was such a clear perversion of the commerce power as to amount to a destruction of the guarantee of the States of local self-government in the matter of production, guaranteed by the tenth amendment of the Constitution.

Those who think that this legislation will be sustained, should not place too much dependence upon the fact that the case of Hammer against Dagenhart was decided by an almost divided Court, for in a later case, a case I too happened to argue—the case of Bailey against the Drexel Furniture Co.—where the United States invoked the supreme power of taxation, as absolute as the power of any sovereign nation in all the world, yet when the taxing power was thus sought to be used to make it impossible for any manufacturer to employ child labor, the Court, with only one justice dissenting, held that that also was a clear perversion of the power of taxation and that it amounted to a usurpation of the rights of the States. Thus it held that each State, if it wanted to abolish child labor, could do so, but it was not for the Federal Government to usurp this police power of the States.

I am not saying that the National Industrial Recovery Act may not in some way pass the gauntlet of the Supreme Court. I say this, because in the first place the plea will be made that it is justified by the existing emergency. But please remember that in the emergency cases all but one were cases of State statutes, passed under the reserved sovereign power of the States except as granted to the Federal Government; and, therefore, in passing upon the boundless power of the States, except as granted to the Federal Government by the Constitution the Supreme Court did hold that if a State felt that in a given emergency some particularly drastic legislation were required, it might be justified on such ground, of which it was the final judge.

There is one Federal case, and that is the Adamson law case, Wilson against New, a case in which again there was an almost evenly divided court—but there the Supreme Court was dealing with an instrumentality of interstate commerce, and therefore the Government had in respect of the interstate railroads of the United States a peculiar power—but even in that case the judges never said that a bill to raise the wages of labor could possibly

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imposing government regulations on business, but problems of determining how far the government could sanction the efforts of business men to regulate themselves. We have had a continuing problem of restraining the majority of those engaged in a trade or industry from dealing too vigorously with a recalcitrant few who, by refusing to comply with the rules of fair play, may threaten to destroy a cooperative program.

Another legal problem has involved protecting the rights of employees to organize and bargain collectively. The provisions of the much discussed Section 7 (a) are merely the affirmation of a constitutional right of liberty of contract which has been in fact recently sustained by the Supreme Court when expressed in almost the same words in another federal law. But difficult legal problems have been presented to the Administration when both employer organization and labor unions have sought to transform the actual authority of the government to preserve a constitutional liberty of contract into a public power to write contracts governing labor relations. Against these pressures the NRA has steadfastly insisted upon preserving the constitutional guarantee of liberty.—*Extracts, see 4, p. 320.*

by Thurman Arnold

Professor of Law, Yale University

THERE appears to be a very generally entertained notion among both liberals and conservatives, that if the Supreme Court of the United States upholds the recent recovery legislation it will be compelled to invent a complete new set of legal terminology, to tear up familiar constitutional landmarks and to graft new doctrine on an ancient document. It is popularly supposed to require a sort of dialectic earthquake, which will leave huge fissures in constitutional logic. It threatens even to create an unconstitutional habit of thought about constitutional issues. The language of economics and sociology, made up of notoriously vague terms, is assumed to be necessary in order to fill in the gaps in the logical structure. Such language, it is thought, will make the constitution look less like a constitution than it did before.

These assumptions have raised a very general question whether constitutional law can survive this major operation on constitutional logic. Grave doubts are expressed by the grave doubters. Logic, they argue, may not be the soul of the law, but it certainly composes a large part of its body. Others are more cheerful. They regard the influx of a new economic terminology and the scrapping of old concepts as inevitable to the march of progress. But both groups are united on one point. They are sure that the Supreme Court in upholding these statutes will be forced to overrule a number of cases, to invent new doctrine and to desert the analogies which have heretofore been regarded as safe anchors to windward.

In view of all these doubts and worries, many of them expressed by learned men, it will be somewhat of a surprise to the logician who investigates the dialectic structure of constitutional law to find that they have little or no foundation in the decided cases. No actual dilemma between logic and expediency faces the Supreme Court if it supports the government. The fact is that the logic of the cases is in favor of the recent legislation, that new doctrine and new terminology are necessary only if the acts are held unconstitutional, and that resort to economics and sociology is required only of those who oppose the legislation. In other words, constitutional logic does not give the safeguards on which conservatives rely, nor does it put in the way of *national* governmental control the obstacles which the liberals fear.

In view of the popular notion to the contrary, it may be of interest to demonstrate this. In doing so we should, at the outset, discard the idea of supporting the acts on some vague notion of self-defense in time of danger, analogous to the powers of the government in time of war. Such a justification might rightly be claimed to be a departure from former constitutional logic. There are of course countries with constitutions whose constitutional law consists of one emergency after another. But with us the notion is reminiscent of "martial law," which has always been considered an unpleasant and only occasional necessity. Martial law, our jurists insist, is not law at all. By the same token, "emergency" law cannot be constitutional law. Therefore if these acts are not to depart from established logic, the present depression must assume a subordinate place in our reasoning, appearing only as one of a number of facts to which the ancient and conservative constitutional principles must apply.

The argument by which this can be accomplished is simple, familiar and entirely conventional. It divides itself into two inquiries each of which has only one answer. First: what are the proper subjects for congressional regulation, and second: how far may such regulation go?

In pursuing the first of these questions we immediately find that the power of Congress to regulate interstate commerce is unquestioned. We further find that this power includes the regulation of anything which directly or substantially affects interstate commerce. Thus we find included in the commerce power practically everything—at least everything of sufficient importance to be worth regulating on a national scale. It will be said that the famous child-labor case prevents congressional regulation of manufacturing. In answer it can be pointed out that the commerce clause, according to that case, of course may not be used as a mere device to force local regulations on state manufacturing. If, however, the regulation of *commerce* is the main purpose of Congress, the case indicates that manufacturing may be regulated as an incident to the use of the larger power. It is apparent that Mr. Justice Day, in his opinion in the child-labor case, meant to commit the Court to that position.

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be passed lawfully by the Congress, but all it said was that for a short period, in order to allow railroad executives sufficient time to negotiate the terms of labor with their employees, that the law, as a mere stopgap, was permissible.

I appreciate all that is said as to the charming personality of the President, his unquestioned patriotism and high motives, but our happy, smiling, well meaning and courageous President will not necessarily be the actual dictator, for under this act he is given power to appoint anybody he chooses, to prescribe their compensation for them and their duties, and to delegate all his dictatorial powers to his selected deputy.

They ought to be in a high state of jubilation in Leningrad, because they are getting a far greater recognition than they ever had before. We are vindicating their theory of government by substituting it for our own. We are beginning a 5-year plan, and we are beginning it with the same arbitrary power. "Imitation is the sincerest form of flattery." We are imitating Moscow. We are turning our backs on Philadelphia, where the Constitution was framed, and knowingly or ignorantly we are marching toward Moscow. Its government is getting the greatest recognition that they ever got, a recognition of their methods, a recognition of their industrial outlook, a recognition of the regimentalizing of the peasant and the workman in the factory.

Our Constitution was once regarded as the noblest form of government in the annals of mankind, and so characterized by one of the greatest statesmen of the nineteenth century, Mr. Gladstone. We are abandoning it in the hysteria of the moment in order to confer absolute power not upon the President, but upon some unknown that he selects. I hope that there will be a reaction. I am not sure of it. Nothing succeeds like success. Revolutions do not go backward. You can tear down in a day what it cost the fathers and succeeding generations of Americans 150 years to erect, and that is what we are doing. That it could be done with 6 hours debate in the United States House of Representatives and without any power of amendment is to me one of the most amazing and depressing situations I have ever seen.

I believe that this act may be a blessing in disguise in this respect, and that is it may create a reaction. I do not mean reaction against the majority party. This question is far above partisan politics. What the majority is now proposing is the monstrous birth of the despair of the moment. We have lost our heads in the present moment of hysteria, and therefore I am not saying it in any partisan sense, but I am satisfied that when the American employer and the American employee, having derived the temporary benefit of the "thirty pieces of silver," for which the constitutional liberties of the American people are now being sold, when they begin to feel the shackles of this bureaucratic tyranny, they will not only revolt in an unmistakable manner, but a powerful movement will begin to bring back the Constitution of the fathers, once the noblest form of government in the world.

No written form of government, however wise, can insure the perpetuity of the Union. To use the homely analogy of the founder of Pennsylvania:

"Governments, like clocks, go from the motion men give them, and as governments are made and moved by men, so by men they are ruined, too. Therefore, governments rather depend upon men than men upon governments."

The same truth was expressed centuries before William Penn, in words that could be profitably written in gold upon the portals of the Capitol:

"Where there is no vision the people perish.—*Extracts, see 6, p. 320.*

by Mark Sullivan

Author and Historian

THE thing to bear in mind about the controversy between N. R. A. and the newspapers about freedom of the press is that it is not a private quarrel. It is not like a controversy between N. R. A. and the steel industry, for example, or the automobile industry, or any other industry.

The beneficiary of the freedom of the press is the public. The newspapers are not just demanding the right to print statements in the interest of themselves as an industry. What they are demanding is to be free to print any kind of criticism whatever, of N. R. A., or of whatever Administration happens to be in power. What they are trying to safeguard is the right to print any criticism that any one may utter about N. R. A.—any one, that is, of such standing that his criticism about any subject deserves to be printed, and would be printed as a matter of course in the ordinary conduct of a newspaper. The newspapers are insisting that they be just as free to print statements about N. R. A. as to print statements about Democrats or Republicans, or about prohibitionists or about wets, or about inflation, or about any other topic of current interest.

Suppose any one of the following men: Senator Carter Glass, or ex-Gov. "Al" Smith, or Herbert Hoover, or Benito Mussolini, or Maxim Litvinoff—suppose any of these should express the opinion that N. R. A. is somewhat short of perfection; or suppose any of the Americans named, or any other American of similar prominence, should denounce N. R. A. and call on the public to oppose it. In that event, the newspapers wish to be just as free to print such a statement as they have been, for example, to print ex-Gov. Smith's denunciations of prohibition.

The newspapers are fighting for the right of each newspaper to have complete freedom to print statements about N. R. A., and to exercise this freedom without fear that N. R. A. will, in the language Gen. Johnson used about

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In any event Mr. Justice Taft so interpreted the case later. The child-labor case is thus in favor of present acts. The burden of inventing new doctrine limiting the power to regulate interstate commerce is thrown on those opposing the recovery legislation. This disposes of the first inquiry as to the existence of the power of Congress to regulate.

The second inquiry is equally simple. How far may congressional regulation of interstate commerce go? May it include the regulation of prices, the restriction of production, and the determination of wages and working hours? Familiar principles can be set out holding that such matters are entirely within the domain of private enterprise. But there is one significant and important exception. If the business is *affected with a public interest*, price, production and employment may be regulated. We have only to determine, therefore, whether the present emergency has affected general business transactions and trade in agricultural commodities with a public interest. If it has, our logical inquiry is ended.

It seems quite apparent that changes of great magnitude have occurred in our national credit structure, and that many factors are impeding the normal flow of commodities in interstate commerce. However, a strictly logical inquiry should not go beyond the decisions. We need therefore only take note of the decision that the Court will regard a congressional finding of fact as having great weight and not to be overthrown without overwhelming evidence to the contrary. Congress has found that the businesses regulated by the present recovery legislation are affected with a public interest because of the acute economic emergency. True, state legislative declarations that certain businesses were affected with a public interest have been on occasion contradicted by the Court. It is scarcely possible to contend, however, that conditions existing when such state legislation was held invalid because the business concerned was not actually affected with a public interest, are comparable to the present emergency. But again we do not need to go beyond the decisions. Mr. Justice Hughes has already taken judicial notice that "a depression such as we are now passing through is a new experience in the present generation." This cannot rationally be said of conditions in the theatre-ticket business when that regulation was held unconstitutional, or in the packing business in Kansas, or in the regulation of employment agencies a few years ago when times were generally considered prosperous. However, the important point for the logician is that Mr. Justice Hughes, speaking for the majority of the Court, did regard the depression as something which was unparalleled in our time. This was in 1931, when prosperity was just around the corner. Little has happened since that time to indicate that the Supreme Court should recede from this statement.

The principle that an economic emergency affects with a public interest matters ordinarily deemed private, has become hornbook law. Railroad hours and wages, and rentals of apartments in New York City, have been regulated on this basis in minor emergencies incidental to far more prosperous times—and at a time when no court had said that the country was going through an experience new to the present generation.

We have therefore proved our case to be within the strict limits of constitutional logic. Congress can regulate interstate commerce and anything which affects it. It can carry that regulation into the control of prices, wages and production, if the business is affected with a public interest. The Supreme Court has said that public interest in business changes with changing conditions. We have the declaration of Congress that conditions have changed, and judicial notice taken by the court of the factors on which Congress acted.

To find a flaw in this familiar and conventional argument, without inventing new doctrine or going outside constitutional law to emotional or economic terms, is indeed difficult. It is probably true that never before in the history of the country have so many things become affected with a public interest (and therefore subject to regulation) at the same time. The government appears to have undergone a change. Persons who feel that constitutional logic always opposes change therefore talk about the act as unconstitutional. But the doctrine that too many things may not be affected by a public interest at the same time has never been announced in any judicial decision. It must be first invented, and then supported by economic and social theories. It is therefore those who oppose the constitutionality of the act who must stretch the logic of constitutional law to the breaking point—not those who favor it.

Why then this worry over the constitutionality of the recovery legislation found in magazine articles, and in bar-association meetings—this wonder whether the Supreme Court will be liberal enough to work its way toward national expediency and away from constitutional logic? The reason lies not so much in anything the Court has done as in the habits of thought of our serious constitutional thinkers, both conservative and liberal. They are used to assuming that the Constitution necessarily discourages adventure in economic organization. On such an assumption hopeless cases have been hopefully taken to the Supreme Court by persons who thought that, because the Court had limited state powers, it would limit national power. Thus may be explained the quixotic efforts to obtain judicial disapproval of the Interstate Commerce Commission, the Federal Trade Commission, the national regulation of stockyards, the national regulation of grain exchanges. In the same way may be explained the present belief that, somehow or other, the decided cases *must* contain something which logically prevents the present extension of federal power.

So far as members of the bar are concerned, it is not their habit to look up cases when discoursing on constitutional law. If a lawyer's opinion is asked on a question of real property, for example, he will say nothing about it until his clerks have handed him long memoranda of the cases. If he is asked a constitutional ques-

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Henry Ford, "crack down on" the paper. To use another of Gen. Johnson's phrases, for newspapers are trying to keep N. R. A. from having the opportunity to sentence any of them to "economic death."

Superficially, of course, the fight is about the right of the newspaper to exist without fear of suppression or intimidation by the Government. To that extent, if you please, the newspapers are interested in a commercial sense. But the beneficiary of freedom of the press is the public; essentially this is the public's fight.

The issue between N. R. A. Administrator Gen. Johnson and the newspapers (as represented by the American Newspaper Publishers' Association) turns on the following language, which the newspapers wish to insert in the newspaper code:

"In submitting this code, or in subscribing or assenting thereto, the daily newspaper publishers do not thereby * * * waive any constitutional rights or consent to the imposition of any requirements that might restrict or interfere with the constitutional guarantee of the freedom of the press."

The newspaper publishers say they will sign no code unless it contains that passage. Inasmuch as an immense majority of the newspapers—indeed the whole press almost without exception—is standing together on this point, it follows that there can be no voluntary code for newspapers, except one that contains this language. Since the newspapers will not enter into a voluntary code unless it contains this language, the only way for a newspaper code to come about is for the President to write one and compel the newspapers to accept it. An attempt by the President to write and impose a code not containing this language would lead to a good deal of commotion.

Whether, later on, after the controversy has gone further—whether at that time the President would attempt to force a code on the newspapers, is a question for the future. The issue in the immediate present is that the newspapers say they will not submit any code unless it contains the passage quoted. On the other side, Gen. Johnson says he will not accept any code from the newspapers if it contains that passage.

Let us consider first the Government's side of the controversy, the side of N. R. A. and Gen. Johnson. They say, in effect, to the newspapers "You are guaranteed freedom of the press by the Constitution and therefore it is not necessary for you to insert this clause in your code." It is true the Constitution says "Congress shall make no law * * * abridging the freedom of speech or of the press."

Gen. Johnson says in effect that "if N. R. A. operates to abridge the freedom of the press, then you newspapers can go into court and have the law declared invalid."

To this the newspapers reply, in effect:

"Ah, yes; but if we sign a code not containing our reservation, and if thereafter we go into court to assert our rights to freedom of the press as guaranteed by the Constitution, then we know what will happen. The Government lawyer—it may be the rather violent-minded Mr. Donald Richberg or even Gen. Johnson himself who, among his versatile and numerous talents is a lawyer—will come into court and say that the newspapers voluntarily signed this code and thereby waived their rights under the 'freedom of the press' clause of the Constitution."

It is precisely against that, precisely to preserve all their rights, and to avoid ever being accused of having estopped themselves by voluntary signature to a code not containing their reservation—it is precisely for this reason that the newspapers insist upon inserting in their code the language quoted.

If they voluntarily sign a code not containing their safeguarding clause, they may be committing suicide. On the other hand, if N. R. A. should compel them to go under a code against their will, and if the courts should thereafter sustain the code in an issue involving freedom of the press, that would be murder. The difference between suicide and murder may not be material; yet it is worth fighting for.

It is difficult, under normal conditions, to imagine that any President—not merely Mr. Roosevelt, but any President—would ever attempt to suppress a newspaper for criticism of the N. R. A. But these are not normal times anywhere in the world. The same nervousness that makes newspapers sensitive about preserving freedom — that same nervousness might lead some N. R. A. administrator, or some President, or other, into temptation to do what Hitler has done in Germany. The possibility of doing it pretty clearly exists in the N. R. A. law. It is important to explain to the reader how this is.

Under the N. R. A. all industries are called upon to submit the codes, and newspapers are regarded as an industry. In all codes of all industries there is a provision, embodied in the N. R. A. statute, which gives to the President—of course, any President at any time while N. R. A. continues—the right to put any industry under a system of licensing. Once a President has put an industry under license, no unit within that industry can operate until after it has taken out the necessary license. And after a unit of industry—in this case any one newspaper—has taken out its license, a President can revoke it.

The power of a President, under the N. R. A. statute, is very broad. The President can put the whole of an industry under license "whenever the President shall find that * * * activities contrary to the policy of (N. R. A.) are being practiced." Similarly the power of a President to revoke a license is very broad. "The President may revoke any such license * * * for violations of the terms or conditions thereof."

This licensing provision applies to all industries. But the provision has a special application to the business of publishing newspapers, periodicals and books, and a special application to the principle of freedom of the press.

A President is empowered to first license and then revoke the license for "activities contrary to the policy of

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tion, however, he is on his feet almost instantly. He assumes that the Constitution opposes change, in spite of every evidence to the contrary, simply because the Constitution has always been used as the great argumentative refuge for the conservatives.

In the same way liberals and radicals have become so firmly convinced that anything they want is unconstitutional that they entertain the same constitutional doubts as the conservatives. They have been so accustomed to conceive of constitutional logic as an archaic system preventing progress that if they were ever convinced that their programs were constitutional they would begin to question their soundness.

In reality the Supreme Court for a long period of time has been paving the way to declare the present recovery legislation constitutional. The emergency finds it well supplied with the necessary formulas. These formulas have been created largely in the process of curbing state legislatures and extending the power of the national government over interstate commerce. National power cannot be built up, and state power curtailed, without using terms which, when applied in their common meaning, support still further extension of national power. It may be that the members of the Supreme Court did not contemplate anything like the present action of Congress. It is likely that they extended the power of Congress because they considered it much less probable that subversive socialistic theory could prevail on a national scale than in individual states. However that may be, words granting power, when once uttered, are hard to limit, even though accompanied by solemn warnings as to their proper use. It is obvious that the preservation of cherry trees in the early days of this great republic would have been more efficiently promoted by refusing to give George Washington any hatchet at all, than by giving him one with directions as to the objects to which it might properly be applied.

Finally, the assumption that the Supreme Court of the United States will regret that by extending the commerce power and the public-interest concept they have made the present legislation logically possible, is purely gratuitous. True it is, the Court has the reputation of disliking intensely those things which are advocated by radicals. But, it may be pertinently asked, who are the radicals supporting this legislation? Much of the applause seems to be coming from old-line Republicans. Much of the outspoken dissent has issued from radical or liberal sources.

It is interesting to note that one of the most impressive paragraphs which may be used to support the recovery acts comes from Mr. Justice Brewer's opinion in the case of In re Debs—a case in which the power of the federal government was being extended, and where a socialist was being punished. It reads as follows:

Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation. . . . Just so is it with the grant to the national government of power over interstate commerce. The Constitution has not changed. The power is the same, but it operates today upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop.—*Extracts see—, p—.*

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ANY realistic discussion of the constitutional problems inherent in the Act must ultimately resolve itself into a question of judicial psychology. A forecast could be little more than guesswork; precedents are at best inadequate guideposts in such abnormal times as these. The problem is not merely one of academic interest, however. Although the emphasis of the Administration has thus far been primarily upon the coöperative aspects of the Act, there have already been attacks upon its validity in the lower courts, and the necessity of eventual enforcement against recalcitrant minorities seems certain sooner or later to bring the question before the Supreme Court. An effort, therefore, to pose the issues upon which the Court will be forced to pass, and to review the considerations which may prove significant, should not be without value.

The Act is extremely general; it merely provides machinery for the formulation and enforcement of voluntary or prescribed codes and agreements. The detailed standards for particular industries are fixed by these codes. Typical of the regulations which they establish are the abolition of child labor, maximum hours of labor, minimum rates of pay, maximum plant activity, collective bargaining, the outlawing of the "yellow dog" contract, and the prohibition of sales below cost and of other unfair trade practices. The codes, when approved or prescribed, have the effect of law, not only as to those who have consented to them, but as to all members of the industry. They are to be enforced as to businesses in or affecting interstate commerce by cease and desist orders, injunctions, fines, and, at the President's discretion, by licensing.

Three constitutional problems seem paramount: (1) is the subject matter sought to be regulated within the power of Congress; (2) do the regulations violate the Fifth Amendment; and (3) has Congress improperly delegated its power to the executives?

Whether the control in industry contemplated by the Recovery Act exceeds the express or implied powers of Congress raises the most serious doubt as to its constitutionality. The sponsors of the bill professed to find authority to enact the measure from three sources: the preamble of the Constitution, the "general welfare" clause, and the commerce clause. The preamble can be

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(N. R. A.). * * *" That language, "contrary to the policy of," is pretty elastic. Conceivably, criticism of N. R. A. by a newspaper (or by a periodical or book) might be interpreted by some President as an "activity contrary to the policy of (N. R. A.). * * *" Not only conceivably but readily and reasonably. Any utterance by a publication tending to impede the universal acceptance and practice of rules laid down by N. R. A. would clearly be an "activity contrary to the policy of N. R. A." Under the N. R. A. law any President has the power to revoke the license of a publisher for any utterance which may seem to the President, wholly in his personal discretion, "contrary to the policy" of N. R. A.

It is not merely that a President might actually revoke a newspaper's license. It is not merely the revoking, but the fear of revocation operating on the mind of the writer, editor or publisher. Newspapers wish to be free of apprehension that any President or any N. R. A. administrator might "crack down" on them.

Gen. Johnson says to the newspapers, "You are seeing hobgoblins. * * * I am as devoted as any of these critics to the constitutional principle of a free press. Nothing will ever be done in or by N. R. A. to impair it."

To the same effect Mr. Donald Richberg says, "There has not been a single action taken or contemplated by the N. R. A. which would endanger freedom of the press."

To these assurances a proper answer by the newspapers would seem to be: "Very well, since you have no such intention or wish, then what is the objection to inserting in our code the reservation which preserves the freedom of the press?"

An essential truth here is that the fundamental spirit of N. R. A. involves the right of the majority to compel the minority. Within every industry, under N. R. A., the majority has a clear right to compel the minority. Further than that, the spirit of N. R. A. as a whole—certainly at first—was that the majority should compel the minority to conform. Written into the language of the so-called "President's agreements," which are a fundamental part of N. R. A., are clauses in which members of N. R. A., and also all consumers, promise to support and patronize only those business men who are members of N. R. A. This is what has come to be recognized as a boycott. And when attempt is made to subject minorities to compulsion it is especially important that the press should be free to speak up for the minority, or to give the minority space to speak for itself.

While Gen. Johnson assures all newspapers that he would never do anything to limit the freedom of any of them, his words are more reassuring than his actions against Henry Ford. All the compulsion which Gen. Johnson and the Government have put upon Mr. Ford, the intimidation of Mr. Ford—"intimidation" is not too strong a word—the attempted exclusion of Mr. Ford from Government contracts, the incitement of the public to boycott Mr. Ford—all this has been done, not because Mr. Ford has violated any regulation of N. R. A., but only because Mr. Ford, by not signing an N. R. A. code, has in effect tacitly shown intellectual disapproval of N. R. A. Mr. Ford has not violated any regulation of N. R. A. All that Mr. Ford has done has been to show by his attitude that he does not approve of N. R. A. This attitude on the part of Mr. Ford is very similar to a newspaper expressing the opinion that N. R. A. is not good. And Mr. Ford's dissent from N. R. A., even when that dissent was only tacit, caused Gen. Johnson, on repeated occasions, to give utterance to sentiments, and to take steps, which are accurately to be described as intimidation. And if Gen. Johnson would try to intimidate Mr. Ford, might he not also try to intimidate a newspaper?—*Extracts, see 7, p. 320.*

by Hon. Malcolm C. Tarver

U. S. Representative, Georgia, Democrat

THE industrial control bill authorizes such agencies as the President may set up, either upon the application of a portion of a trade or industry supposed to be representative of it, or of some branch of it, or "upon his own motion," to fix regulations for the Government of that trade or industry, which "shall contain * * * maximum hours of labor, minimum rates of pay, and other working conditions." Licenses may be required of "business enterprises," and if not secured or if revoked, anyone who carries on such enterprise shall be guilty of a crime. In other words, no man could carry on a business of trade or industry without complying with such regulations covering wages, hours of labor, and working conditions as might be prescribed, and without securing, if required a license from the Federal Government. The bill is far beyond the provisions of the Black 6-hour bill, in which it was proposed for Congress to legislate on the subject of hours of labor. In this bill Congress delegated the power to legislate, not merely to the President, but to "such officers, agents and employees as he may designate or appoint"; and not merely with reference to hours of labor, but with reference to the entire field of industrial operation and control.

The Supreme Court of the United States has clearly said in the child-labor decision, and reaffirmed in subsequent decisions that I shall not take time to cite, that Congress has no power to enact any such legislation. Waiving aside the question of the right of Congress to delegate to the Executive branch of the Government its legislative authority, the legislation touches a subject matter that under Constitution is purely within State control.

No lawyer can read the language of that decision and say that under its meaning Congress can control, or authorize anybody else to control, the manufacturer of goods in your State or mine, and everything incident to their manufacture, merely because those goods are to be shipped in interstate commerce. The fact that it was a

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summarily dismissed, for the Supreme Court has explicitly said that it confers no power on Congress. Likewise, the "general welfare" proviso is commonly construed as a specification of the purposes for which money may be appropriated, and not as a substantive grant of power. Any other view would be completely inconsistent with the doctrine that the Federal Government is one of enumerated powers. The commerce clause, together with such supplementary authority as may be derived from the "necessary and proper" clause, remains therefore, as the only express provision on which the Act can be rested.

The chief obstacle to sustaining the law under this power is the rule enunciated in *Hammer v. Dagenhart,* (in which a congressional enactment, prohibiting the transportation in interstate commerce of goods produced in factories employing child labor, was held invalid,) that Congress cannot condition the shipment of goods in interstate commerce upon the maintenance of prescribed standards of manufacture. Should the Court apply this rule to the present legislation, it must necessarily be held unconstitutional, but there are good reasons to believe that the case may be either overruled or distinguished.

The complete abandonment of *Hammer v. Dagenhart* is certainly conceivable. The decision was five to four, with a vigorous minority opinion by Mr. Justice Holmes. Since then the composition of the Court has changed considerably. From the start the case has been strongly and at times violently criticized; it has found few defenders.

The precise rationale of the decision is not easily gathered from the language of the opinion. The Court conceded that previous cases had established the power of Congress to prohibit interstate transportation when "the use of . . . (such) transportation was necessary to the accomplishment of harmful results," but sought to distinguish the case before them on the ground that the evil, child labor, was complete before shipment began, and that therefore transportation could not be a causal element. As has frequently been pointed out, this argument ignores the economic realities. Interstate traffic in goods made by child labor promotes the evil in the shipping state by providing its manufacturers with a wider market, and the competition of goods thus cheaply produced imperils the maintenance of higher standards in the states to which they flow. It is significant that in a subsequent decision, the Court conceded that intrastate thefts were encouraged by the opportunity to ship and sell the stolen cars in interstate commerce. This, together with the earlier cases, indicates that the real ground of *Hammer v. Dagenhart* was the belief that the causal connection between child labor and interstate shipment was too indirect to justify congressional interference.

The distinction then becomes one of degree and the question one of fact. Certainly, as Mr. Justice Brandeis has pointed out, when the basis of a constitutional decision is factual, the Court should feel free to revise its position as conditions change or experience sheds new light upon them. There were many who doubted that the decision was economically sound in 1918; in the intervening fifteen years the industrial texture has become even closer knit and business even more dependent upon interstate markets. Experience during the depression has abundantly shown that low industrial standards in one producing area induce similar conditions in others. In these factors the Court may find persuasive reason for reversing itself.

But even if the Court is unwilling to overrule *Hammer v. Dagenhart,* there are several possible grounds on which the present legislation may be distinguished. It may cogently be argued that while, in normal times, the causal connection between interstate shipment and manufacturing conditions is not sufficiently close to permit congressional regulation, in a depression industry in one area is far more sensitive to standards elsewhere, so that interstate competition will more directly affect local conditions. And it may further be urged that industrial standards, thus depressed through the mechanism of interstate commerce, in turn diminish that commerce by delaying recovery. Of even more importance, the essential motive of Congress in enacting the Recovery Act was economic rehabilitation—the promotion of commerce—and the control of the standards of production and distribution was regarded primarily as a means to this end. The Recovery Act seems, therefore, far more closely allied to regulation of commerce than was the child labor law, which was aimed principally at the prevention of a social evil. The Court has consistently held that Congress may directly control strictly intrastate activities whenever they tend to burden or interfere with interstate commerce. To sustain the Act under this line of cases, therefore, would not seem to require an impossible extension of previous doctrine.

Should the Court adopt one of these alternatives and hold that Congress has power over the subject matter sought to be regulated, the further question remains as to the extent to which that power may validly be exercised. Analytically, the businesses of the country may be divided into four groups: (1) those which ship all or part of their products in interstate commerce; (2) those which are "within the stream of interstate commerce"; (3) those which produce goods for strictly intrastate consumption but which compete with enterprises of an interstate nature; and (4) those whose character and competition are entirely local. If Congress has any power at all to regulate standards of manufacture and distribution, it is obvious that it may do so for business of the first type. That control of a particular company's interstate business may also directly affect its intrastate activities cannot validly be urged as an objection to the exercise of such control. Regulation of business within the second group raises equally litle difficulty; supervision over such enterprises as stockyards, which are considered as being "within the stream of commerce," has long been permitted. As to the third class, however, there is greater doubt. The sponsors of the bill believed that the maintenance of

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5-to-4 decision makes no difference. It is the law of the land until it is overruled. And as a Member of Congress, sworn to uphold the Constitution, I can do no less than accord to it the meaning which has been given it by the highest court in the land.

It is sought to differentiate the National Industrial Recovery Act from the character of legislation the Supreme Court says is unconstitutional, upon the ground that it is an emergency measure. I defy any one to point out any provision of the Constitution, or any decision of the Supreme Court, construing it, which authorizes the conclusion that the existence of an emergency vests in Congress the right to exercise power over matters expressly reserved to the States by the tenth amendment.

If I felt that there is a chance the Supreme Court might uphold this type of legislation, I should oppose it all the more strongly. I shall never take part in the establishment of a precedent under which any Congress in future, perhaps a Congress inimical to my section of the country, perhaps a Congress in whose councils the manufacturing interests of other sections may have a voice and those of my section have none, may impose any character of restricting, hampering, ham-stringing legislation it desires upon the manufacturers of my State. We shall not always have a President Roosevelt; it is conceivable that at some time in the future we might have another Republican administration; and I tremble to think what the cotton manufacturers of New England, who have long been jealous of the gradual transfer of that industry to the South, might do to southern textile manufacturers under a Republican administration if a precedent like this is established and upheld by the courts. If we can do this, we can do anything we want with regard to goods that are to be shipped in interstate commerce. We can say to the cotton farmer, "Neither you nor anyone for you, shall work more than 3 hours, or 5 hours, or 6 hours a day; you shall not pay your hired hand less than $3 per day—if you do, it will be a crime to transport the cotton you raise in interstate commerce." Perhaps no Congress would ever go to such extremes, but I shall not be one to vote in favor of saying that Congress has the right, if it desires, to regulate all matters of that sort.—*Extracts, see 8, p. 320.*

by Raymond M. Hudson

Attorney, Washington, D. C.

The National Recovery Act, the Code of Fair Competition for the Petroleum Industry, and the Interpretations of the Code are unconstitutional and invalid, if construed to be applicable to the business of those doing a purely local state business, without any connection whatever with interstate commerce. Such application of the Act by the Government will amount to a confiscation of the business of those doing a local or state business; will put them into bankruptcy; and will cause a severe loss to citizens who have unredeemed coupons, issued prior to the National Recovery Act. The decisions are all to the point that the Act, the Code and the Interpretations are invalid.

The emergency now is not a war-time emergency, and it is nothing in comparison to the emergency in 1866 at the close of the great Civil War, when large portions of the country were devastated and there was no financial system, but out of which grew the present national banking system.

In the fifteenth section of the Virginia Bill of Rights, George Mason declared:

"That no free government or the blessings of liberty, can be preserved to any people, but by * * * frequent recurrence to fundamental principles."

A practical dictatorship of the Executive has been established, and there has been an attempted delegation to him of many Legislative and Judicial functions.

Justification for this subversion of our government plan has been claimed on account of a National emergency. But as our Supreme Court in an earlier day of far greater emergency (1866) wisely said:—

"No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its (the Constitution's) provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, * * * the theory of necessity on which it is based is false." Ex parte Milligan, 4 Wall, 1; decided in 1866.

In the Knight case, (156 U. S. 131), the Supreme Court held Congress could not forbid or control manufacture of sugar and said:

"It is vital that the independence of the commercial power and the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of Union, the other is essential to the preservation of the autonomy of the states as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality." —*Extracts, see 9, p. 320.*

by Andrew A. Bruce

Professor Constitutional Law, Northwestern University

Both the Fifth and the Tenth Amendments of the Federal Constitution are contravened by the National Industrial Recovery Act.

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high standards by companies engaged in interstate commerce would be impossible if they were forced to meet destructive competition from intrastate concerns with low standards, and that, therefore, such concerns directly affected interstate commerce and were within Congress' regulatory power under the doctrine of the *Shreveport* case. While there undoubtedly is force in this contention, it is clear that its acceptance would involve a considerable extension of previous concepts as to the authority given the Federal Government by the commerce clause. That the Supreme Court will go even beyond this and uphold, under the Recovery Act, regulation of intrastate enterprises not competing with goods shipped in interstate commerce, appears extremely doubtful. It may be urged that the "obstructions to the free flow of interstate and foreign commerce" can be removed only by stimulating business activity generally, and that this, in turn, requires an increase in the purchasing power of all consumers, regardless of the character of the enterprise in which they are engaged. Such an argument, however, would seem to supply too tenuous a basis for the revolutionary change in the distribution of governmental power which it entails.

The second major ground on which the legislation may be attacked is that many of the code provisions violate the Fifth Amendment. Upon this question a considerable body of precedent exists. Prohibition of child labor has been held a proper exercise of legislative power. Likewise, restrictions upon hours of labor for adults, although less stringent than those of the codes, have been sustained. On the other hand, the Supreme Court has said that minimum wage laws, even though confined to women, are undue deprivations of liberty. Similarly, attempts to outlaw the "yellow dog" contract or to prevent the discharge of employees because of union membership, have been defeated. And the regulation of prices for ordinary commodities has been held improper.

But precedents here are even less helpful than those under the commerce clause. "Due process" is admittedly a creature of time and circumstance; interference with private rights in the public interest to a degree which would be invalid under normal conditions may be justified during an emergency period. The Adamson Law, fixing railroad wages for from seven to eleven months in order to prevent a serious tie-up, was sustained in 1917. Subsequently, the drastic restrictions imposed during the war, and even the fixing of rents necessitated by the housing shortage which followed the war, were sustained by the Court as extraordinary measures. That the present crisis is as serious as those can hardly be denied. Like the Adamson Law, the war legislation, and the rent regulations, the Recovery Act is limited in duration. At the expiration of two years it automatically terminates, and it may terminate earlier if Congress declares the emergency at an end. If it wishes, therefore, the Court may easily sustain most of the code provisions as not unreasonable methods for dealing with the depression. The most doubtful, perhaps, is the "yellow dog" provision, but even this may be upheld on the ground that it forms an integral part of a unified plan of control.

The licensing provision, the most extreme form of regulation provided by the Act, has been criticized as being a denial of due process under the authority of the *New State Ice* case. The analogy is scarcely apt. While the power of the state to require licenses as a prerequisite to doing business is very broad, the validity of its exercise depends upon the propriety of the terms upon which their issuance is conditioned. The decision in the *Ice* case was simply that a showing of "public convenience and necessity" could not properly be required for a license to enter an ordinary business. While the Recovery Act provided merely that licenses shall be granted "pursuant to such regulations as the President shall prescribe," they would presumably be similar to the codes, and the power to impose these regulations would seem to raise no new problems. So too, the President's power to "suspend or revoke" a license in case of violation depends upon his power to prohibit transportation entirely except upon the terms fixed.

The third ground of attack upon the validity of the Recovery Act will doubtless be that it violates the constitutional principle of "'separation of powers." That legislative power may not be delegated by Congress is elementary; that such delegations have constantly been made and consistently upheld by the Supreme Court is equally well known. While paying lip-service to the general rule, the Court has repeatedly recognized that governmental practicability makes its doctrinaire application impossible under modern conditions. From the multitude of decisions may be abstracted a fairly well-defined standard by which the propriety of any particular delegation is to be gauged: Congress may confer quasi-legislative power upon an administrative agency if it has established as far as is practicable the primary purpose of the legislation, and has demarcated the limits of the power delegated as fully as the circumstances permit.

Formulating this test from past decisions is far easier than applying it to the Recovery Act. Opponents of the NRA will point out that the legislative purpose has been announced in the most general of terms, and that the President has been given practically uncontrolled discretionary power to prescribe regulations for industry to control the interstate transportation of oil, and to change tariff rates, the only limitation being that the purpose of his activity must be "to rehabiliate industry," "relieve unemployment," "eliminate unfair trade practices," and otherwise "provide for the general welfare." They will contend that this is in effect a delegation of the power to announce a legislative policy, rather than to enforce a policy already announced. Certainly in no previous statute has there been such a broad grant of power with so indefinite a guide given to a congressional enforcement agency. On the other hand, as the proponents of the Act will urge, never before has there been such necessity for the delegation.—*Extracts.*

Bruce *Cont'd*

Formerly, our theory was that the Federal Government was a government of limited and of delegated powers. Now an attempt is made to make it supreme. Formerly we insisted upon a theory of individualism of State rights and of local police control, and the Supreme Court has repeatedly held that even the power to regulate interstate commerce could not be used to control the domestic policies of the several states. Now the State is being forgotten and has been practically made a County in the Federal organization.

Under the presumed power to regulate commerce the Federal Government is controlling prices, controlling output, controlling hours of labor and fixing wages. Formerly our constitutional policy was one of individualism which frowned upon monopolies of all sorts and favored freedom of competition.

Should the Supreme Court sustain the N. R. A. the justices will be acting as statemen or politicians, rather than as judges interpreting and administering established law. They will be stretching the Constitution as much as Mr. Marshall did to weld 13 states into a nation.

Personally I would say we should get behind the N. R. A., but at the same time we should say: "Step warily. This far you may go and no further." Even if we concede that the Tugwellian theories may be temporarily helpful, we must not permit the destruction of the fundamentals of our Government or our hope in America.

The Act revolutionizes the Democratic Party. Formerly the party stood for State's rights. In this Act the party gives the Federal Government such powers as it never before contemplated.

The Federal Government has only those powers delegated to it. Every decision regarding previous attempts to regulate production and wages in industry has held that such affairs are purely State matters.

Only when the product begins to move from the State to another State has the Federal Government any power, and then only on the movement and not manufacture, previous opinions have held.

In the N. R. A. Act the government will regulate business, not directly, but by virtue of the power over interstate commerce. Transportation will be closed to the business man who will not conform to the act. By direct legislation, Congress would not have the power to pass such an act.

The question before the Supreme Court will be whether there is such tremendous emergency, beyond the power of the States to control, as would allow the creation of a Mussolini in the form of a board or something else to interfere with individual liberty. This is a most difficult problem and how the court will hold, no one can say.—*Extracts, see 10, p. 320.*

by Hon. George B. Terrell

U. S. Representative, Texas, Democrat

I AM profoundly impressed with the present trend of events and greatly alarmed for the future at the present tendency to abandon the principles upon which the Democratic party was founded and to strike down all constitutional safeguards and launch the ship of state on an unchartered sea in a storm of passion and reckless action.

Times change and men change with them, but sound principles endure forever. We cannot at one fell stroke radically and recklessly change the whole plan and system of government which has made this the greatest and strongest Government in the world, without grave danger of destroying constitutional government and substituting in its stead a communistic government with a sympathetic and humanitarian dictator in command, who may be substituted at any time with a Mussolini, a Hitler or a Stalin, who might use these tremendous powers conferred by this bill in a manner not contemplated by its supporters, and to the great detriment and irreparable harm to the public.

Revolutions never go backward, and when we once abandon the principles upon which this Government was founded and guided to its present state of leader of the world, in education, finance, and civilization, there is no turning back but a constant command to go forward and grant more power to the Government to control every activity of the people; and initiative and individual effort, the pillows of the Government, will be weakened and finally destroyed and the Republic will be no more.

I invite attention to a few paragraphs of the famous 15-minute inaugural address of the founder of the Democratic Party, Thomas Jefferson:

Peace, commerce, and honest friendship with all nations —entangling alliances with none.

The support of the State Governments in all their rights as the most competent administrations for our domestic concerns and the surest bulwarks against anti-Republican tendencies.

A wise and frugal government which shall restrain men from injuring one another, which shall leave them otherwise free to regulate their own pursuits of industry and improvements, and shall not take from the mouth of labor the bread it has earned.

Agriculture, manufacture, commerce, and navigation, the four pillows of our prosperity, are most thriving when left most free to individual enterprise.

These maxims are very timely, and it seems that the great constructive statesman was endowed with the gift of prophecy and could see through the mist of time and penned these immortal lines for this particular occasion. —*Extracts, see 11, p. 320.*

Progress of National Problems Discussed in 1933 Issue of the Congressional Digest

January—Beer

On March 13 the President sent to Congress his famous 72-word message urging the passage of a beer bill.

On March 14 the House Committee on Ways and Means reported H. R. 3341, introduced by Representative Thomas H. Cullen, New York, Democrat, and the bill was immediately passed on that day by a vote of 316 to 97.

The Cullen bill was reported to the Senate by the Committee on Finance, with amendments, on March 15 and passed by a vote of 43 to 30. The bill, as passed by the House, fixed the alcoholic content of beer at 3.2 per cent. The Senate amended the bill by making the content 3.05 per cent and including wines. The bill went to conference, where the House provision for 3.2 per cent was restored. The conference report was agreed to by the Senate on March 20 and by the House on March 21. The bill was signed by the President on March 22.

The bill became effective 15 days after it was signed by the President, or on April 7. It provides for the manufacture and sale of beer and wines containing not more than 3.2 per cent alcohol. A revenue tax of $5 a barrel is placed on beer.

February—Domestic Allotment

The Domestic Allotment plan for farm relief, considered during the Seventy-second Congress, was included in the provisions of the Agricultural Adjustment Act, approved by the President May 12, 1933.

The terms "domestic allotment" and "agricultural adjustment" mean exactly the same thing. As applied to existing farm conditions, the plan involves the voluntary agreement on the part of a farmer to curtail the amount of acreage he cultivates in return for financial payments from the Federal Government.

The main features of the Agricultural Adjustment Act are as follows:

Seeks by balancing production and consumption to re-establish farmers' pre-war purchasing power, based on 1909-1914 prices.

Permits cotton planters to take options on Government-owned cotton, provided they agree to reduce their 1933 production by at least 30 per cent, and arrange for sale of options at a higher price expected to result from curtailed production.

Gives Secretary of Agriculture power to provide for reduced acreage or production of any basic agricultural commodity through agreements with producers and to provide for rental or benefit payments to the farmers to bring the curtailment about.

Defines wheat, cotton, corn, hogs, cattle, sheep, rice, tobacco and milk as "basic agricultural commodities."

Fixes the payments to farmers "in such amounts as the Secretary deems fair and reasonable to be paid out of any moneys available for such payments."

Authorizes the Secretary to enter marketing agreements with and to license processors, associations of producers and other agencies handling farm products in interstate or foreign commerce. Such processors and associations would be entitled to receive loans from the Reconstruction Corporation.

Levies a tax on the processor of any basic agricultural commodity to raise the revenues needed to carry out the emergency law, the tax to equal the difference between current average prices and the fair exchange value based on pre-war prices.

Provides that the act shall cease to be in effect whenever the President proclaims the agricultural emergency has ended.

March—Currency Expansion

The action of the President under the Emergency Banking Act which has caused the greatest controversy is that having effect on the gold standard. The daily press is at present full of discussion of this topic. This and the other policies of the administration regarding currency and banking are outlined in the following Presidential proclamation of March 6:

Whereas there have been heavy and unwarranted withdrawals of gold and currency from our banking institutions for the purpose of hoarding; and

Whereas continuous and increasingly extensive speculative activity abroad in foreign exchange has resulted in severe drains on the Nation's stocks of gold; and

Whereas these conditions have created a national emergency; and

Whereas it is in the best interests of all bank depositors that a period of respite be provided with a view to preventing further hoarding of coin, bullion or currency or speculation in foreign exchange and permitting the application of appropriate measures to protect the interests of our people; and

Whereas it is provided in section 5(B) of the act of October 6, 1917, (40 Stat. L. 411), as amended, "that the President may investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange and the export, hoarding, melting or earmarking of gold or silver coin or bullion or currency, * * *; and

Whereas it is provided in section 16 of the said act "that whoever shall willfully violate any of the provisions of this Act or of any license, rule, or regulation issued thereunder, and whoever shall willfully violate, neglect, or refuse to comply with any order of the President issued in compliance with the provisions of this act, shall, upon conviction, be fined not more than $10,000, or, if a natural person, imprisoned for not more than ten years, or both, * * *;"

Now, therefore, I, Franklin D. Roosevelt, President of the United States of America, in view of such national emergency and by virtue of the authority vested in me by said act and in order to prevent the export, hoarding, or earmarking of gold or silver coin or bullion or currency, do hereby proclaim, order, direct and declare that from Monday, the sixth day of March, to Thursday, the ninth day of March, nineteen hundred and thirty-three, both dates inclusive, there shall be maintained and observed by all banking institutions and all branches thereof located in the United States of America, including the Territories and Insular Possessions, a bank holiday, and that during said period all banking transactions shall be suspended. During such holiday, excepting as hereinafter provided, no such banking institution or branch shall pay out, export, earmark, or permit the withdrawal or transfer in any manner or by any device whatsoever, of any gold or silver coin or bullion or currency or take any other action which might facilitate the hoarding thereof; nor shall any such banking institution or branch pay out deposits, make loans or discounts, deal in foreign exchange, transfer credits from the United States to any place abroad, or transact any other banking business whatsoever.

April—Banking

See Currency Expansion above.

May—Tariff Reciprocity

The Department of State has been engaged for several months in negotiating reciprocal tariff treaties with three Latin American nations—Colombia, Brazil and Argentina. It is expected that the Colombian treaty will be the first to be completed and that all three will have been completed by the time Congress convenes in January. Until the Latin American treaties are disposed of no efforts will be made to negotiate tariff treaties with European nations.

June-July—Suspension of Anti-Trust Laws

Under the Provisions of the National Industrial Recovery Act the Anti-trust Laws were suspended for a period of two years.

August-September—Radio Control

No action has been taken by the Government on the matter of radio control. As pointed out in the August-September number any of the proposed changes looking to Government operation or greater Government regulation must be taken by Congress which has not been in session since the publication of the August-September number.

October—Recognition of Russia

Following an exchange of notes between President Roosevelt and President Kalinin of Russia, Maxim Litvinov, Russian Commissar for Foreign Affairs visited Washington to negotiate conditions of recognition with President Roosevelt.

As the Digest goes to press the negotiations have been declared practically completed, but the exact terms of the agreement have not been formally announced.

The negotiations came as a result of the following formal correspondence between President Roosevelt and President Kalinin:

THE WHITE HOUSE

Washington, October 10, 1933.

My dear Mr. President:

Since the beginning of my administration, I have contemplated the desirability of an effort to end the present abnormal relations between the hundred and twenty-five million people of the United States and the hundred and sixty million people of Russia.

It is most regrettable that these great peoples, between whom a happy tradition of friendship existed for more than a century to their mutual advantage, should now be without a practical method of communicating directly with each other.

The difficulties that have created this anomalous situation are serious but not, in my opinion, insoluble; and difficulties between great nations can be removed only by frank, friendly conversations. If you are of similar mind, I should be glad to receive any representatives you may designate to explore with me personally all questions outstanding between our countries.

Participation in such a discussion would, of course, not commit either nation to any future course of action, but would indicate a sincere desire to reach a satisfactory solution of the problems involved. It is my hope that such conversations might result in good to the people of both our countries.

I am, my dear Mr. President,

Very sincerely yours,

Franklin D. Roosevelt.

Mr. Mikhail Kalinin,

President of the All Union Central Executive Committee, Moscow.

Moscow, October 17, 1933.

My dear Mr. President:

I have received your message of October tenth.

I have always considered most abnormal and regrettable a situation wherein, during the past sixteen years, two great republics—The United States of America and the Union of Soviet Socialist Republics—have lacked the usual methods of communication and have been deprived of the benefits which with such communication could give. I am glad to note that you also reached the same conclusion.

There is no doubt that difficulties, present or arising, between two countries, can be solved only when direct relations exist between them; and that, on the other hand, they have no chance for solution in the absence of such relations. I shall take the liberty further to express the opinion that the abnormal situation, to which you correctly refer in your message, has an unfavorable effect not only on the interests of the two states concerned, but also on the general international situation, increasing the element of disquiet, complicating the process of consolidating world peace and encouraging forces tending to disturb that peace.

In accordance with the above, I gladly accept your proposal to send to the United States a representative of the Soviet Government to discuss with you the questions of interest to our countries. The Soviet Government will be represented by Mr. M. M. Litvinov, People's Commissar for Foreign Affairs, who will come to Washington at a time to be mutually agreed upon.

I am, my dear Mr. President,

Very sincerely yours,

MIKHAIL KALININ.

MR. FRANKLIN D. ROOSEVELT,
President of the United States of America, Washington.

November—Power of The President

THE extent and use of the Executive power continues to be a much discussed topic in the daily press in connection with the N.R.A. and the financial policy of the Roosevelt administration.

Glossary of Terms Used in this Issue

Anti-trust Acts—Federal and state statutes to protect trade and commerce from unlawful restraints and monopolies.

Code—In legal phraseology a code is a set of laws designated to regulate the subject to which it relates. As used under the N.R.A., an industrial code is a set of regulations adopted by an industry under which that industry will operate.

Collective Bargaining—Bargaining by a group of employees for wages and working conditions as distinguished from individual bargaining by a single employee.

Commerce Clause—The commerce clause of the Constitution of the United States is found in Article I, sec. 8, Par. 3; which provides that Congress shall have power "To regulate Commerce with foreign Nations, and among the several States and among the Indian tribes."

Company Union—A union of workers whose membership is confined to employees of the company for which they work and which is not affiliated with any regular labor union.

Due Process of Law—Law in its regular course of administration through courts of justice. This security is provided for in the Fifth and Fourteenth Amendments to the Constitution of the United States.

Freedom of Press—The right to print and publish the truth from good motives and for justifiable ends.

General Welfare—The Preamble of the Constitution gives the promotion of "the General Welfare" as one of the reasons for the writing and adoption of the Constitution.

Interstate—Between states. This term applied to commerce means any sort of commerce between one state and another as distinguished from commerce or business confined to one state.

Intrastate—Within a state.

Licensing Provision—That provision of the N.I.R.A., which empowers the President to grant or withhold licenses to do business under the Act.

N.I.R.A.—National Industrial Recovery Act, approved by the President on June 16, 1933.

N.R.A.—National Recovery Administration, the organization set up under the authority granted by the National Recovery Act to administer the provision of that Act designed to bring about industrial recovery.

Open Shop—The term applied to a shop in which labor unions are not recognized. In an open shop the employer employs non-union employees entirely, or non-union and union workers both, but treats those workers who are members of unions as individuals and not as union men.

Separation of Powers—This term, as applied to functions of the Federal Government, refers to the Constitutional division of powers among the Legislative, Executive and Judicial branches of the Government.

State Rights—The rights under the Constitution of the U. S. inhering in the separate states. The Democratic party and its predecessors have generally leaned toward a strictly limiting construction of the Constitution respecting the rights transferred under it from the states to the Federal Government; while the Republican party and its predecessors have generally leaned toward a liberal construction.

Yellow Dog—When a man accepts work from an employer who uses the "Yellow Dog" contract, he signs the agreement that he will not join a labor union, that if he does he will quit the employment, and that he will accept whatever wages are fixed by the employer, and that he will be subject to whatever rules and regulations are made by the employer.

The Students' Question Box

Replies to Queries on U. S. Supreme Court

Q. Are the members of the Supreme Court subject to Impeachment?

A. All Federal judges, together with all other civil officers of the Government, were made subject to impeachment by the Constitution of the United States, for "Treason, Bribery and other high Crimes and Misdemeanors."

Q. Has a member of the Supreme Court ever been impeached?

A. Only one Justice of the Supreme Court has been impeached—Samuel Chase, who was acquitted in 1805.

Q. Where does the Supreme Court sit?

A. In the Capitol Building in Washington, in the old room originally built for the Senate. The new building for the Court, in course of construction, is east of the Capitol plaza and immediately north of the Library of Congress.

Q. Is it necessary for a man to be a native born American to be eligible for appointment to the Supreme Court Bench?

A. No. One of the present members, Associate Justice Sutherland, former Senator from Utah, was born in Buckinghamshire, England.

Q. What is the meaning of "judicial review?"

A. "The power of courts to pass upon the Constitutionality of legislative acts which fall within their normal jurisdiction to enforce and the power to refuse to enforce such as they find to be unconstitutional and hence void."

Q. Is there any appeal from a decision of the Supreme Court?

A. No. All decisions by the Supreme Court are final. No mode is provided by which any tribunal can reëxamine what the Supreme Court has decided. The case is not only settled, but the principles of the decision remain as precedents for the settlement of cases of similar nature, which may arise in the future. The Supreme Court cannot again hear a case decided by it during a previous session, though a new case, involving the same questions may be heard, and, despite precedent, obtain a contrary decision.

Q. Must the Supreme Court have a specific case before it to render a decision?

A. Yes. The Court from the outset has confined itself to its judicial duty of deciding actual cases. In 1793 the opinion of the Court was sought by President Washington and the Court replied that it considered it improper to declare opinions on questions not growing out of a case before it.

Q. How many opinions are necessary for a decision?

A. The quorum is six. Therefore four are necessary, four being a majority of a quorum, in the absence of the other judges.

Q. Has Anyone ever been twice a member of the Supreme Court?

A. Yes. Charles Evans Hughes. (*See Biography, page 298*).

Q. How many ex-presidents have been members of the Supreme Court?

A. One. William Howard Taft. (President, 1909-1913. Chief Justice, 1921-1930.)

Q. What is the tenure of office of the members of the Supreme Court?

A. During good behavior. A member of the court may retire on full pay after 10 years' service, if he so desires, providing he is seventy years of age, but is not compelled to do so.

Q. Does the Supreme Court have any jurisdiction over political questions?

A. The Court has always declined to consider pure political questions of any kind.

Q. By whom are the members of the Supreme Court appointed?

A. By the President of the United States with the approval of two-thirds of the Senate.

Q. Is it an expensive procedure to take a cause into the Supreme Court?

A. No, the cost of carrying a case through the Supreme Court is comparatively slight. The court fees are very small; the main expenses are for counsel fees and printing the record.

Q. In a case where a state is either the plaintiff or the defendant who appears and answers for the state?

A. The Attorney-General of the state in question. If

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Continued from page 319

the case involves the Federal Government the Attorney-General or one of his assistants appears on behalf of the Government.

Q. Where did the first Supreme Court meet?
A. The Supreme Court met for the first time in New York, in the Royal Exchange, a building located at the foot of Broad Street, on February 1, 1790.

Q. When does the Supreme Court convene?
A. On the second Monday in October of each year.

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2—(Carson) "The Supreme Court."

3—(Sullivan) "Article in the *Washington Star,* Nov. 19, 1933.

4—(Richberg) Address Cleveland Bar Association, Cleveland, O., Nov. 10, 1933.

5—(Arnold) Article in the *New Republic,* Nov. 15, 1933.

6—(Beck) *Congressional Record* of May 25, 1933.

7—(Sullivan) Article in the *Washington Star,* Oct. 29, 1933.

8—(Tarver) *Congressional Record* of May 25, 1933.

9—(Hudson) Argument before Supreme Court of Dist. of Columbia, Nov. 13, 1933.

10—(Bruce) Speech before the Chicago Kiwanis Club, Sept. 21, 1933.

11—(Terrell) *Congressional Record,* May 26, 1933.

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